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1912.

March. Sir John Compton Lawrance, *one of the Justices of the King's Bench Division, resigned his office on account of ill-health. He was afterwards appointed a member of the Privy Council.*

June 10. The Right Honourable the Earl of Loreburn *having resigned his office of Lord Chancellor of Great Britain on account of ill-health, the Great Seal was delivered to* The Right Honourable Richard Burdon, Viscount Haldane, *who took his place at the Board of the Privy Council accordingly.*

October 1. The Right Honourable William Snowdon Robson, Baron Robson, G.C.M.G., *having resigned his office of one of the Lords of Appeal in Ordinary, owing to ill-health,* The Right Honourable Sir John Fletcher Moulton, *Lord Justice of Appeal, was appointed his successor and was created a Baron for life by the style of* Baron Moulton of Bank *in the county of Southampton.* The Honourable Sir John Andrew Hamilton, *one of the Justices of the King's Bench Division, was appointed a Lord Justice of Appeal, and* Mr. Sydney Arthur Taylor Rowlatt, *Junior Counsel of the Treasury, was appointed a Justice of the High Court, King's Bench Division. He was afterwards knighted.*

November 1. Clement Meacher Bailhache, Esq., K.C., *was appointed one of the Justices of the High Court of Justice, King's Bench Division, under s.* 1 *of the Supreme Court of Judicature Act*, 1910, *and was afterwards knighted.*

December 5. The Right Honourable Sir John Compton Lawrance, *late a Judge of the King's Bench Division, died at his residence at Onslow Square, Kensington, at the age of* 80.

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LIST OF THE JUDICIAL COMMITTEE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1912.

Earl of *Loreburn*,
Viscount *Haldane*, } Lord Chancellors.
Earl of *Halsbury*.
Viscount *Morley of Blackburn*, Lord President.
Marquis of *Londonderry*,
Earl of *Rosebery*,
Earl of *Crewe*,
Earl *Beauchamp*. } Ex-Lord Presidents.
Lord *Ashbourne*.
Lord *Macnaghten*.
Lord *Lindley*.
Lord *Alverstone*.
Lord *Dunedin*.

Lord *Atkinson*.
Lord *Shaw of Dunfermline*.
Lord *Gorell*.
Lord *De Villiers*.
Lord *Mersey*.
Lord *Robson*.
Sir *Edward Fry*.
Sir *Samuel Way*, Bart.
Sir *Ford North*.
Sir *Samuel Griffith*.
Sir *Arthur Wilson*.
Sir *Henri Elzéar Taschereau*.
Sir *John Edge*.
Sir *Charles Fitzpatrick*.
Sir *Edmund Barton*.

Syed *Ameer Ali*.

And others who being present or past Lords Justices of Appeal are members of the Privy Council (44 *Vict. c.* 3), *or who being members of the Privy Council hold or have held high judicial offices* (50 & 51 *Vict. c.* 70).

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1911
June 16.

T. W. THOMAS & CO., LIMITED . . . . Appellants;

AND

PORTSEA STEAMSHIP COMPANY, LIMITED Respondents.

Admiralty—Ship—Bill of Lading—Incorporation of Conditions of Charter Party—Arbitration Clause.

A bill of lading provided that the goods shipped thereunder should be delivered to the shipper or to his assigns, "he or they paying freight for the said goods, with other conditions as per charter party," and in the margin was written, in ink, "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause." The charter party provided that "Any dispute or claim arising out of any of the conditions of this charter shall be adjusted at port where it occurs, and same shall be settled by arbitration":—

Held, that the arbitration clause was not incorporated in the bill of lading.

Hamilton & Co. v. *Mackie & Sons* (1889) 5 Times L. R. 677, followed.

Decision of the Court of Appeal [1911] P. 54, affirmed.

Appeal from a decision of the Court of Appeal in England.(1)

The appellants were timber merchants of Swansea; the respondents were shipowners of Cardiff and were the owners of the steamship *Portsmouth*.

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(1) [1911] P. 54.

H. L. (E.)
1911

T. W. THOMAS & Co., LIMITED v. PORTSEA STEAMSHIP COMPANY, LIMITED.

By a charter party dated January 14, 1909, and signed by the respective agents of the parties at Liverpool, it was mutually agreed between the respondents, owners of the steamship *Portsmouth*, and certain charterers that the said steamship should proceed to certain ports therein named and load a full and complete cargo of timber and proceed therewith to such port on the west coast of Great Britain as ordered on signing bills of lading. The charter party contained a cesser clause in the following terms:—"All responsibility whatsoever of the charterer hereunder ceases as soon as the cargo is alongside, the vessel holding a lien upon the cargo for freight and demurrage." It also provided, inter alia, for the discharge of the cargo by the steamer at the port of destination, in the usual manner with customary steamer despatch, according to the custom of the port, "but if through any fault of the merchant or charterer the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and it contained the following arbitration clause:—"Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

Under this charter party a cargo of timber was carried from Parrsboro Roads, N.S., to Swansea. The appellants were the consignees of the cargo and the holders of the bill of lading relating thereto. By the bill of lading the goods were to be delivered to the shipper, W. Malcolm Mackay, or to his assigns, "he or they paying freight for the said goods, with other conditions as per charter party with average accustomed." There was also a marginal clause in writing as follows: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause."

The question raised by this appeal was whether the arbitration clause in the charter party was incorporated by reference in the bill of lading.

In April, 1910, the respondents commenced an action against the appellants in the Cardiff County Court for 200*l.*, eight days' demurrage at the port of discharge. The appellants applied that all proceedings in the action should be stayed under s. 4 of the Arbitration Act, 1889. The county court judge granted a

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1911
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stay, and his order was affirmed by the Divisional Court (the President and Bargrave Deane J.). (1) The Court of Appeal, following *Hamilton & Co.* v. *Mackie & Sons* (2), held that the arbitration clause did not apply to a dispute between the shipowner and the holder of the bill of lading and set aside the orders of the Divisional Court and the county court.

June 15, 16. *Leslie Scott, K.C.*, and *Holman Gregory, K.C.*, for the appellants. The question is whether upon the construction of the charter party and the bill of lading the arbitration clause in the charter party is incorporated in the bill of lading, and, consequently, whether the claim of the shipowner against the bill of lading holder for demurrage at the port of discharge should be referred to arbitration. The words in the marginal clause in the bill of lading are sufficiently wide and explicit for this purpose, and those words were inserted in writing in the margin to exclude the operation of the cases which, on the principle of ejusdem generis, have limited the effect of the incorporation arising from the use of similar words in the body of the bill of lading following a provision for payment of freight. The cesser clause has a material bearing on this question. This is one of those charter parties in which the liability of the charterer ceases as soon as he has provided a cargo; it was not contemplated that the charterer would have any interest at all in the group of clauses relating to the discharge of the cargo, but the intention was that the charter party should control the bill of lading holder; and the marginal addition in the bill of lading was inserted for the protection of the shipowner. But then it was said on behalf of the shipowner —and this argument prevailed in the Court of Appeal—that because the arbitration clause was in the charter party it was only binding on the parties there mentioned, and that inasmuch as the parties to the bill of lading were not identical this clause was not incorporated. *Weir & Co.* v. *Pirie & Co.* (3) affords a complete answer to that argument and shews that when the clause is incorporated in the bill of lading it applies to disputes between the shipowner and the bill of lading holder. Putting aside the doctrine of ejusdem generis, the rule is that under general words of incorporation all such terms and conditions are incorporated as are not inconsistent with the document in which they are to be incorporated and are not insensible as applied thereto. *Hamilton & Co.* v. *Mackie & Sons* (1) was thought by the Court of Appeal to be binding upon them, but, so far as appears, there was not in that case any cesser clause such as is to be found here, and the case is distinguishable on that ground. [They also referred to *East Yorkshire Steamship Co.* v. *Hancock* (2) and *Gullischen* v. *Stewart Brothers.* (3)]

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(1) [1910] P. 293.
(2) 5 Times L. R. 677.
(3) (1898) 3 Com. Cas. 263.

Bailhache, K.C., and *Albert Parsons*, for the respondents. Although the words in the bill of lading are in themselves wide enough to cover the arbitration clause, upon the authorities they have not that effect. It would be dangerous to hold that a general reference in a bill of lading to the charter party incorporates the whole of the charter party, because a great deal of money passes on bills of lading, which are negotiable instruments, and the purchaser of a bill of lading never sees the charter party. Accordingly the Courts have taken care not to put upon the purchaser of a bill of lading peculiar clauses in the charter party which he has had no opportunity of seeing. By general words of incorporation only those clauses are incorporated which relate to the carriage and delivery of the goods, including the duty of the bill of lading holder to take delivery and the terms upon which he is entitled to demand delivery: *Manchester Trust* v. *Furness* (4) and the authorities there cited. The key to these cases is to be found by remembering what is the office and function of bills of lading and the manner in which they pass from hand to hand: *Gullischen* v. *Stewart Brothers.* (3) In determining what passes under a general clause of this kind the bill of lading is the primary document to be looked at, and the question of the scope of the cesser clause is not relevant to that question. *Hamilton & Co.* v. *Mackie & Sons* (1) was rightly decided and governs this case. There was there no essential difference in the terms of incorporation, and it has been treated by text-writers as an authority for the proposition that under a general reference in the bill of lading to the charter party the arbitration clause will not be incorporated: Scrutton on Charter Parties and Bills of Lading, 6th. ed. p. 52.

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(1) 5 Times L. R. 677.
(2) (1900) 5 Com. Cas. 266.
(3) (1884) 13 Q. B. D. 317.
(4) [1895] 2 Q. B. 539.

Further, the fact that the parties are different in the two documents and the language of this arbitration clause shew that it is not applicable to disputes between the shipowner and the bill of lading holder.

Leslie Scott, K.C., in reply. The fallacy of the respondents' argument lies in the fact that the authorities relied on in support of it relate to the usual form of words " paying freight and all other conditions as per charter." Those cases do not touch this marginal clause, which must have been inserted for a different purpose, namely, for the purpose of getting over the rule of ejusdem generis. If the words of incorporation appeared in the body of the bill of lading apart from any connection with payment of freight, that would be sufficient to exclude the ejusdem generis doctrine, but the case is stronger where a marginal clause is added in writing. It is a mere question of construction in each case: *Russell* v. *Niemann* (1), quoted by Lord Esher in *Serraino & Sons* v. *Campbell* (2); *Larsen* v. *Sylvester & Co.* (3) [He also referred to *Restitution Steamship Co.* v. *Sir John Pirie & Co.* (4) and *Glynn* v. *Margetson.* (5)]

June 16. LORD LOREBURN L.C. My Lords, the question in this case seems to me to be whether an arbitration clause found in the charter party is applicable to the contract evidenced by the bill of lading, and to disputes arising between the shipowners and the holders of the bill of lading under that document.

The bill of lading itself is the primary document to be considered. It acknowledges the shipment of the goods in the usual way and the terms upon which the goods are to be delivered. There are two paragraphs in it which refer to the charter party. One of them is in the body of the bill of lading and provides for the goods to be delivered to " William Malcolm Mackay or to his assigns, he or they paying freight for the said

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(1) (1864) 17 C. B. (N.S.) 163, at p. 177.

(2) [1891] 1 Q. B. 283.

(3) [1908] A. C. 295.

(4) (1889) 7 Asp. M. L. C. 11, n.

(5) [1893] A. C. 351.

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1911

T. W. Thomas & Co., Limited v. Portsea Steamship Company, Limited.

Lord Loreburn L.C.

goods, with other conditions as per charter party with average accustomed." Now it is well settled that under words of that kind it could not be said that the arbitration clause in the charter party is incorporated or made applicable.

Then there is another paragraph in the bill of lading relating to the charter party. It is as follows: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause." I do not think that this paragraph brings into the bill of lading the arbitration clause any more than the other. The arbitration clause is not one that governs shipment or carriage or delivery or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter party and disputes arising out of the conditions of the charter party, not disputes arising out of the bill of lading.

I am of opinion that the Court of Appeal rightly relied upon the decision in *Hamilton & Co.* v. *Mackie & Sons* (1), and that, if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter party, it must be done explicitly.

Lord Atkinson. My Lords, I concur in the judgment of my noble and learned friend on the woolsack.

I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight,—the proper subject-matters with which the bill of lading is conversant,—this should be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading in this case.

I concur in regard to the other point mentioned by my noble and learned friend.

Lord Gorell. My Lords, I concur in the judgment which has been pronounced by my noble and learned friend on the

(1) 5 Times L. R. 677.

woolsack, but I should like to say a few words about this case because it is one of a class of cases that constantly occur, and these questions as between consignees and shipowners are of very great commercial importance.

The charter party in this case was made between certain shipowners and certain charterers for the loading of a large cargo of wood goods (I am taking it quite shortly) at, I think, the port of Halifax, or some other port, for a port in this country; there was a clause for cesser of liability, and there were provisions as to freight and the time for loading and the time for discharge; and there was also an arbitration clause in these terms: "Any dispute or claim arising out of any of the conditions of this charter party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

My Lords, under that charter party a cargo was provided, but it was not shipped by the charterers; it appears to have been shipped by a certain Mr. W. Malcolm Mackay, with whom no doubt the charterers had arranged for a cargo. The whole cargo appears to have been dealt with in one bill of lading, which, after providing for usual exceptions, winds up by saying that the cargo is to be delivered "unto W. Malcolm Mackay or to his assigns, he or they paying freight for the said goods, with other conditions as per charter party with average accustomed." The bill of lading also has a marginal clause written in ink: "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause."

I think it has hardly been seriously argued that the clause as to "paying freight with other conditions as per charter party" in the body of the bill of lading would incorporate the arbitration clause in this case. There is ample authority against any such view, and I pass from that point. But it is said that the special clause in the margin has in fact had the effect of bringing into the bill of lading the arbitration clause which is to be found in the charter party.

To my mind the question is one of construction, and when one turns to the marginal clause in question I have very serious doubt whether it carries the question one bit further than the clause

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which is found in the body of the bill of lading, except, of course, so far as it brings in the exceptions in the charter party, and those exceptions are to include the negligence clause; because it adds, in words, nothing more than that all other terms and conditions are to be those of the charter party, to the words in the body "with other conditions as per charter party."

Now the case of *Hamilton & Co.* v. *Mackie & Sons* (1) has already decided that the words "all other terms and conditions as per charter party" have not the effect of bringing the arbitration clause into the bill of lading. We have not had a full report of that case so as to enable us to judge whether there was a cesser clause in that case or not; but I cannot help thinking myself, having regard to the date of the decision and the fact that there was a full cargo, as I understand the report, that it is extremely probable that there was in that case a cesser clause, which had become quite common at the date when that decision was given; and the conclusion to which I come is that that case was rightly decided and that it governs the present case. But, whether it does so or not, it seems to me that the marginal clause does not contain words in it which incorporate the arbitration clause in the present case. I think the true view to take of such a clause is that the "terms and conditions" do not really include more than refers to those matters which have to be dealt with by both the shipowner and the consignee in relation to the carriage, discharge, and delivery of the cargo. To what extent they include what refers to those matters I do not pause to consider, but I do not see that they expressly in any way deal with the arbitration clause; and, of course, it is sufficient for present purposes to say that they do not; but my view is that what they deal with is no more than what I have already stated.

That being so, if one considers this case a little more broadly, the shipper is not likely, I think, to have been desirous of consenting to an arbitration clause which places upon him possibly the obligation of deciding by arbitration at any port where a dispute occurs a question on which there is any dispute. Certainly no consignee would ever naturally be likely to assent to such a proposition, because he might find himself landed in the

(1) 5 Times L. R. 677.

difficulty of having to go to arbitration at a port of shipment with which he had no further connection than the mercantile one of correspondence.

It therefore seems to me, when one looks at the matter broadly, that the true construction to place upon this clause is what I have already suggested; and that the point may be made still plainer by trying to see what would be the effect produced if this clause of arbitration were actually written into the bill of lading. If it were written in, it would at once be seen that it is not a clause which in its terms is consistent with the bill of lading—it is consistent with disputes arising under a charter party; and that again leads to the conclusion that it was never intended to be inserted as part of a bill of lading which was to pass from hand to hand as bills of lading, being negotiable instruments, usually do.

But there is a wide consideration which I think it is important to bear in mind in dealing with this class of case. The effect of deciding to stay this action would be that the bill of lading holder or shipowner (in this case it would be the shipowner, but it might just as well occur where a bill of lading holder is concerned who does not wish for an arbitration,)—that either party is ousted from the jurisdiction of the Courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude, or does carry out any intention of excluding, the jurisdiction of the Courts in cases between the shipowner and the bill of lading holder. It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer; and therefore I concur in the motion which my noble and learned friend on the woolsack has made, that this appeal should be dismissed.

LORD ROBSON. My Lords, the question here is whether the appellants, who are consignees of the goods, can compel the shipowners to submit to arbitration on a claim for demurrage instead

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of bringing an action. For this purpose they must shew that the bill of lading constituting the contract between the shipowners and themselves contains a clear stipulation to that effect. There is an arbitration clause in the charter applicable to "any dispute or claim arising out of the conditions of this charter party," and providing that it "shall be adjusted at the port where it occurs and settled by arbitration." The appellants contend that this clause is incorporated in the bill of lading by reference.

There are two references in the bill of lading which purport to incorporate all or some of the terms of the charter. With regard to the clause in the body of the document which expresses the obligation of the shipowner to deliver the goods to the consignee, "he or they paying freight, with other conditions as per charter," very little need be said. These words have been the subject of a series of decisions which establish that such a reference does not incorporate every clause or term of the charter, but only those terms which are ejusdem generis with that for the payment of freight.

There is written, however, in the margin of this bill of lading a clause which deals with the incorporation of the provisions of the charter in somewhat wider terms. It says "Deck load at shipper's risk, and all other terms and conditions and exceptions of the charter are to be as per charter party, including negligence clause." In these words we have no specific reference to the payment of freight so as to import a limitation on their generality, but I do not think they differ in effect from the clause in the body of the bill of lading so far as the question in the present case is concerned. Both clauses are subject to the rule that the terms of the charter party when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted, and it is not absolutely clear that, when thus tested, this arbitration clause is applicable to a dispute between persons other than the parties to the charter. It expressly relates only to disputes "arising out of the conditions of this charter party" and would stand in the bill of lading with that limitation. In one sense it is perhaps difficult to imagine any dispute relating

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to the chartered voyage which might not be said to arise out of the conditions of the charter, but we are here dealing with obligations founded primarily on the bill of lading, which is a different contract and is made between different parties, though it relates in part to the same subject-matter as the charter. The limitation of the clause to the conditions of "this charter party" is therefore, to say the least, embarrassing and ambiguous when it comes to be written into the bill of lading. It requires, indeed, some modification to make it read even intelligibly in its new connection.

It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to read as part of the bill of lading and then purport to deal only with disputes arising under a document made between different persons are quite sufficiently explicit for the appellants' purpose.

On the whole, therefore, I think their contention fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1911.

Solicitors for appellants: *Botterell & Roche, for J. D. Rawlings, Swansea.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

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H. L. (E.)
1911
Oct. 30.

JAMES AND ALEXANDER BROWN . . Appellants;

AND

TURNER, BRIGHTMAN & CO. . . . . . Respondents.

Charterparty—Construction—Time Charter—Payment of Hire — Exemption Clause—Strike.

By a time charterparty a steamship was let at a monthly hire for a certain period to be employed in such lawful trades as the charterers should direct within certain geographical limits, and the charterparty contained an exemption clause, which provided that "the owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented" by (among other things) strikes. During the currency of the charter the charterers ordered the ship to a port where, to their knowledge, a strike of colliers was in operation, for the purpose of loading a cargo of coal. On the arrival of the ship, she was prevented by the strike from loading for several weeks. A dispute arose between the owners and the charterers as to whether under the charterparty the hire was payable during this period:—

Held, (1.) upon the construction of the exemption clause (Lord Shaw of Dunfermline dissenting), that the words "carrying out this contract" meant merely performing the obligations imposed upon the respective parties by the contract and did not include exercising the rights bestowed upon them by the contract; (2.) that upon any construction of the clause the charterers were not prevented by the strike from carrying out the contract, inasmuch as they could have withdrawn the ship from the strike area; consequently that the hire was payable.

Decision of the Court of Appeal affirmed.

Appeal from an order of the Court of Appeal in England.

At the time of the dispute hereinafter referred to the respondents were the owners and the appellants were the charterers of the steamship *Zambesi*.

By a time charterparty (in the form approved by the Steamship Owners' Association of Australasia), dated October 16, 1908, the appellants agreed to charter and the respondents agreed to let the steamship for a period of twelve months at a hire of 775*l.* per month, payable monthly in advance. By an agreement, dated December 31, 1909, the charterparty was extended for a further period of twelve months from the expiry of the original period, namely, January 14, 1910, at the increased hire of

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880*l.* per month, otherwise the terms and conditions to be the same as in the original charter.

Clause 6 of the charterparty provided that the vessel was to be employed in such lawful trades as the charterers or their agents should direct within certain geographical limits. Clauses 11 and 12 provided for the rate of hire and the time and place of payment thereof, and for re-delivery. Clause 28 provided that in the event of loss of time from deficiency of men or stores, breakdown of machinery, collision, docking, stranding, or other accidents or damage preventing the working of the vessel for more than twenty-four consecutive hours there should be no payment for such time.

Clause 31, which was headed "Mutual exceptions," provided so far as material as follows:—"The owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented by the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, or through strikes of any kind, collisions, stranding, and other accidents of navigation even when occasioned by negligence, default or error in judgment of the pilot, master mariners or other servants of the shipowners or charterers. . . . ."

Clause 32 provided for the reference of disputes under the charterparty to arbitration.

In January, 1910, the appellants sent the *Zambesi* to Newcastle, New South Wales, for the purpose of loading her with a cargo of coal for a voyage to Manila. At that time, to the knowledge of the charterers, a strike of colliers was in operation at Newcastle. The strike was still in operation on January 18 when the *Zambesi* arrived at Newcastle, and continued without intermission till March 16, 1910, and no cargo was loaded during the strike period. Disputes arose between the parties, including a dispute as to whether hire continued to run or ceased during such time as was occupied by the *Zambesi* lying at Newcastle without loading, and these disputes were referred to arbitration. The appellants (the charterers) contended on the reference that the hire of the vessel ceased to be payable under the charter from midnight

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of January 18 to midnight of March 16, 1910, on the ground that owing to the strike it was impossible during that period to load a cargo of coal as contemplated. On February 2, 1910, the vessel was sent away by the respondents (the owners) from Newcastle to Sydney to undergo her periodical survey, and she returned to Newcastle on February 22. During that period the respondents admitted that the hire of the vessel ceased, but with that exception they disputed the contention of the charterers. The arbitrators gave their award in the form of a special case. They found as facts: (1.) that during the periods from midnight of January 18 to noon of February 2 and from noon of February 22 to midnight of March 16, 1910, the appellants were prevented by the strike from loading a cargo of coal on board the vessel at Newcastle for her intended voyage; (2.) that when the appellants ordered the vessel to Newcastle they knew that a strike of colliers was in operation there, which would probably delay the vessel, but they acted in good faith and in the ordinary course of their business in sending the vessel to Newcastle to load coals for Manila; (3.) that there were other trades in which the vessel might have been employed by the appellants within the limits defined by the charter and which would not have been interfered with by any strike.

The question submitted by the arbitrators for the opinion of the Court was whether upon the true construction of the charter hire ceased to be payable during the said two periods. Bray J. answered this question in favour of the appellants, but his decision was reversed by the Court of Appeal, the Court being of opinion, upon the construction of clause 31, that it meant to absolve the parties from liability in carrying out the contract so far only as they were hindered or prevented by the causes therein specified from performing their obligations under the contract.

Atkin, K.C., and *Leck*, for the appellants. The question turns simply upon the construction of clause 31 of the charterparty. That is a mutual clause, and is intended for the benefit of the shipowner and for the benefit of the charterer; and if either party is hindered or prevented from exercising his rights or performing his duties under the contract by any of the excepted causes he is to that extent absolved from liability under the contract. On the view taken by the Court of Appeal no effect is given to the mutual nature of the exemptions because substantially the only obligation of the charterer is to pay the hire, and none of the events enumerated in the clause would prevent him from paying the hire. Clause 28 covers loss of time occasioned by the breakdown of the ship, but that has nothing to do with clause 31, and it cannot be contended that because that special relief is given by clause 28, therefore clause 31 must be construed as giving no further relief. Commercially speaking, the appellants were prevented by the strike from having the use of the ship for which they had contracted, and to that extent they are absolved from liability. The charter gives them the right to employ the ship in any trade they may direct, and they have been hindered and prevented from exercising that right by the strike.

Maurice Hill, K.C., and *A. Adair Roche*, for the respondents, were not called upon.

EARL LOREBURN L.C. My Lords, I do not think there is any occasion to call upon the learned counsel for the respondents, for I agree in the conclusion at which the Court of Appeal has arrived.

It is a very short point. The case turns upon the construction of a clause in a charter, and it amounts to this: whether the charterers were prevented from carrying out their contract by a strike.

Now if by "carrying out this contract" is meant merely performing obligations due from the charterers to the owners or from the owners to the charterers as the case may be, then it is quite clear that the strike did not prevent the charterers from doing what they were bound to do, namely, to pay the hire of this ship.

But if upon the clause it can be said that the charterers were prevented from carrying out this contract because they were prevented from enjoying the rights bestowed upon them by this contract, and that this was the true meaning, then equally I think tne strike did not prevent it. They used all their rights all the time. They took the ship to the port that they chose; they kept the ship at the port that they chose. The only misfortune was that they could not get a cargo. It was no part of the obligation of the owners to see that they did get a cargo.

To my mind the real meaning of this contract is that which was placed upon it by the Court of Appeal. But even if that were not so, I do not think the appellants could succeed, for the reasons I have stated.

Lord Atkinson. My Lords, I concur.

Lord Shaw of Dunfermline. My Lords, in this case the arbitrators have found that "there were other trades in which the said vessel might have been employed by the charterers within the limits defined by the said charter and which would not have been interfered with by any strike."

In order to give effect to this, which has been purposely stated by the arbitrators, I look at the contract itself, and I observe that, as is usual in such cases, the charterers have an ample right to direct the movements and the course of the vessel. The arbitrators find accordingly that, in sending this vessel to Newcastle in New South Wales at a certain date, they were sending it deliberately,—it may have been in the course of trade, but they were sending it deliberately—within the area of a strike.

My Lords, under the charterparty it was clear that the charterers had power to withdraw it from the area of the strike, and to place it and trade with it elsewhere; and, according to the finding of the arbitrators, they could have in fact done so, so that the vessel might have been employed fully as a cargo-carrying boat during that period. They, however, exercised an option of retaining the vessel within the area of the strike.

I may say, my Lords, that I do not see my way in terms to agree with the view which has been reached by the Court of Appeal on the construction of the words "mutually absolved," which occur in this contract. It does not appear to me to be sound to say that the liability of the charterers was merely to pay rent, and that, as the strike had not prevented them doing that,

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therefore the absolving clause does not apply. I think that a strike with its consequence of preventing the use of the vessel as a carrier (which is indeed the sole or main consequence which the parties must have had in view) was an occasion when on the one hand the charterer might not be able to use his vessel, and on the other the owner should not be entitled to his rent, and in my opinion the term "mutually absolved" ought to be construed so as to meet this case and as covering the liabilities on both sides of a mutual or reciprocal character.

But on the other hand, my Lords, I think the same result as that arrived at by the Court of Appeal is reached by reason of the fact that the charterers were not in fact prevented by the strike from the use of the vessel during the period in question, but themselves chose, as I have explained, to keep it lying in the strike area. In my view, accordingly, they cannot found upon this clause in the sense argued at your Lordships' Bar.

LORD MERSEY. My Lords, I agree with the judgment of the Lord Chancellor for the reasons he has given.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 30, 1911.

Solicitor for appellants: *J. Wicking Neal.*
Solicitors for respondents: *Botterell & Roche.*

[HOUSE OF LORDS.]

H. L. (E.)
1911
Nov. 3.

E. CLEMENS HORST COMPANY . . . . APPELLANTS;

AND

BIDDELL BROTHERS . . . . RESPONDENTS.

Sale of Goods—C.i.f. Contract—Terms Net Cash—Payment against Shipping Documents—Delivery—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 28.

A contract for the sale of hops to be shipped from the Pacific Coast to this country provided that the buyer should pay for the hops at the rate of ninety shillings sterling per 112 lbs. "c.i.f. to London, Liverpool or Hull. Terms net cash." The contract contained no term expressly providing for payment against shipping documents:—

Held, that the seller was entitled to payment upon his shipping the goods and tendering to the buyer the bill of lading and insurance policy.

Decision of the Court of Appeal [1911] 1 K. B. 934, reversed.

APPEAL from an order of the Court of Appeal in England (1) reversing the judgment of Hamilton J. (2) in an action for breach of contract.

By an agreement in writing dated October 13, 1904, and made at Sunderland between the defendants (the present appellants), of San Francisco and London, parties of the first part, and C. Vaux & Sons, Limited, of the city of Sunderland, parties of the second part, it was provided as follows:—

"The parties of the first part to sell to the parties of the second part one hundred (100) bales equal to or better than choice brewing Pacific Coast hops of each of the crops of the years 1905-1912 inclusive.

"The said hops to be shipped to Sunderland. The parties of the second part shall pay for the said hops at the rate of ninety (90) shillings sterling per 112 lbs. C.I.F. to London Liverpool or Hull.

"Terms net cash.

"It is agreed that this contract is severable as to each bale.

"The sellers may consider entire unfulfilled portion of this contract violated by the buyers in case of refusal by them to pay for any hops delivered and accepted hereunder or if this contract or any part of it is otherwise violated by the buyers.

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(1) [1911] 1 K. B. 934.

(2) [1911] 1 K. B. 214.

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"Time of shipment to place of delivery or delivery at place of delivery during the months (inclusive) of October to March following the harvest of each year's crop.

"If for any reason the parties of the second part shall be dissatisfied with or object to all or any part of any lot of hops delivered hereunder the parties of the first part may within thirty days after receipt of written notice thereof ship or deliver other choice hops in place of those objected to."

A second agreement, dated December 21, 1904, and made between the same parties, was in precisely the same terms as the first, except that it provided for the sale by the defendants to C. Vaux & Sons, Limited, of fifty bales of British Columbian hops of each of the years 1906 to 1912 inclusive at the same price, c.i.f. to London.

On August 11, 1908, C. Vaux & Sons, Limited, assigned for value to the plaintiffs (the present respondents) all their rights and benefits under these two contracts, and in September, 1908, the plaintiffs gave the defendants written notice of the two assignments.

On January 29, 1910, the defendants wrote to the plaintiffs: "With reference to our hop contracts assigned to you by Messrs. Vaux we are now ready to make shipment to you of the entire 150 bales 1909 crop of the contracted quality and according to the terms of the contract. . . . For the invoice price less freight we will value on your good selves at sight with negotiable bills of lading and insurance certificates attached to draft and if you wish we will also attach certificates of quality of the Merchants' Exchange, San Francisco or other competent authority to cover the shipments."

On February 1, 1910, the plaintiffs wrote to the defendants in reply that they were prepared to take delivery on the terms of the contracts, and they continued: "It is in accordance with the universal practice of the trade and the custom adopted by you in your dealings with other purchasers of your hops and it has also been your custom with our assignors to submit samples and the samples having been accepted to give delivery in bulk in accordance with the samples but if you decline to adopt the usual and undoubtedly most convenient course we can only pay for the hops against delivery and examination of each bale. We

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cannot fall in with your suggestion of accepting the certificate of quality of the Merchants' Exchange San Francisco."

On February 5, 1910, the defendants' solicitors wrote to the plaintiffs' solicitors that as the defendants had intimated their willingness to fulfil their obligations in strict accordance with the contracts, and as by their letter of February 1, 1910, the plaintiffs had refused to pay the contract price except upon terms not provided by the contracts, the defendants, accepting the said refusal as a clear breach of the contracts by the plaintiffs, would not ship the 150 bales to the plaintiffs and reserved their rights in respect of the breach by the plaintiffs.

On March 11, 1910, the plaintiffs issued the writ in the action claiming damages against the defendants for breach of contract in refusing to deliver the hops. The defendants denied the breach and counterclaimed for damages in respect of the non-acceptance of the hops.

Hamilton J. held that under a c.i.f. contract the buyers were bound to pay the agreed price in exchange for the shipping documents even though payment was not expressed to be "against documents," and he gave judgment for the defendants upon the claim. He also gave judgment for the defendants upon the counter-claim for 175*l.*, that being the difference between the contract price and the highest price which the defendants were able to get quoted when after the plaintiffs' repudiation they sought to sell the goods upon the same contractual terms.

The Court of Appeal (Kennedy L.J. dissenting) reversed the judgment of Hamilton J. and gave judgment for the plaintiffs; and at the request of the parties the Court assessed the damages on the claim at 481*l.* 5*s.* Upon the counter-claim all the Lords Justices were of opinion that in any view of the case Hamilton J. had proceeded upon a wrong principle in assessing the damages, and that the defendants had failed to prove any substantial loss by reason of the plaintiffs' non-acceptance of the hops.

The defendants appealed.

Atkin, K.C., and *F. D. Mackinnon*, for the appellants. Under a contract for the sale of goods on c.i.f. terms the seller fulfils his obligations by shipping the goods and tendering to the buyer the bill of lading and insurance policy, and the buyer has to pay the agreed price in exchange for those documents, whether the contract does or does not in terms provide that payment shall be made "against documents": see *Ireland* v. *Livingston* (1), per Blackburn J. The respondents' contention, namely, that the time for payment does not arise until the goods are delivered in the destined country and the buyer has had an opportunity of examining them, involves that the seller must pay the landing charges at the port of discharge, which is inconsistent with the terms of the contract. The construction contended for by the appellants does not interfere with the right of the respondents to reject the goods, if, upon examination, they should be found to be not in conformity with the contract. The terms of payment in this contract read in conjunction with s. 28 of the Sale of Goods Act, 1893, are cash against delivery, and delivery here means delivery of the shipping documents. Delivery may be actual or constructive, and in the case of seaborne goods delivery of the bill of lading is a symbolical delivery of the goods: *Sanders* v. *Maclean*. (2) The appellants desire to adopt the reasoning of Kennedy L.J. in the Court of Appeal.

[They also contended that Hamilton J. had followed the right principle in assessing the damages on the counter-claim, but upon this point the House did not call upon counsel for the respondents.]

Shearman, K.C., and *Eustace Hills*, for the respondents. The question is whether upon this contract the respondents have agreed to buy hops without having an opportunity of examining them before payment. The construction for which the respondents contend is that cash is to be paid against physical delivery of the hops at Sunderland. This construction is supported by the subsequent clauses of the contract and particularly the clause which provides for the case of refusal by the buyers "to pay for any hops delivered and accepted hereunder." That is almost inconsistent with the appellants' contention, because it implies that the respondents are to have examination of the goods before payment; for acceptance involves examination. There is no ground for reading into this contract "cash against documents."

(1) (1871) L. R. 5 H. L. 395, 406.

(2) (1883) 11 Q. B. D. 327, 341.

In most c.i.f. contracts the words "cash against documents" or "bill against documents" are added, and Kennedy L.J. begs the question when he speaks of the fuller and the shorter form of contract and treats the two as equivalent. The provision as to freight and insurance is simply a mode of fixing the price and cannot be properly read as an agreement by the buyer to give up his right to examine the goods before payment. The respondents do not seek to charge the appellants with the landing expenses at the port of discharge. [They referred to *Gibson* v. *Small* (1) and *Parker* v. *Schuller*. (2)]

Atkin, K.C., replied.

EARL LOREBURN L.C. My Lords, in this case there has been a remarkable divergence of judicial opinion, Hamilton J. and Kennedy L.J. holding one view and Vaughan Williams and Farwell L.JJ. entertaining another. There is no doubt that the contract is of rather an exceptional and peculiar kind, as might have been inferred from the judicial difference to which I have alluded. For my part I think it is reasonably clear that this appeal ought to be allowed; and the remarkable judgment of Kennedy L.J., illuminating, as it does, the whole field of controversy, relieves me from the necessity of saying much upon the subject.

This is a contract usually called a c.i.f. contract, under which the seller is to ship a cargo of hops and is to contract for freight and to effect insurance; and he is to receive 90*s*. per 112 lbs. of hops. The buyer is to pay cash. But when is he to pay cash? The contract does not say. The buyer says that he is to pay cash against physical delivery and acceptance of the goods when they have come to England.

Now s. 28 of the Sale of Goods Act says in effect that payment is to be against delivery. Accordingly we have supplied by the general law an answer to the question when this cash is to be paid. But when is there delivery of goods which are on board ship? That may be quite a different thing from delivery of goods on shore. The answer is that delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it.

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(1) (1853) 4 H. L. C. 353.

(2) (1901) 17 Times L. R. 299.

Now in this contract there is no time fixed at which the seller is entitled to tender the bill of lading. He therefore may do so at any reasonable time; and it is wrong to say that he must defer the tender of the bill of lading until the ship has arrived; and it is still more wrong to say that he must defer the tender of the bill of lading until after the goods have been landed, inspected, and accepted.

Upon the question of the counter-claim, I think the Court of Appeal was right, and that there must be only one shilling damages upon the counter-claim.

Accordingly, Hamilton J.'s order ought to be restored so far as the claim is concerned. As regards the counter-claim, I think there ought to be judgment for the defendants with one shilling damages, and no costs on either side.

LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, I also concur.

LORD SHAW OF DUNFERMLINE. My Lords, I desire to express my adherence to the opinion delivered by Kennedy L.J., the value of which has not been overstated by the noble Earl on the woolsack.

Order of the Court of Appeal reversed. Judgment to be entered for the appellants, the defendants, on the claim with costs here and below, including the costs of the action. Judgment to be entered for the appellants, the defendants, on the counter-claim for one shilling damages with no costs upon either side.

Lords' Journals, November 3, 1911.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents: *Nicholson, Graham & Jones.*

[HOUSE OF LORDS.]

H. L. (E.) COLLEY'S PATENTS, LIMITED . . . . . APPELLANTS;

1911 AND

Nov. 7. METROPOLITAN WATER BOARD . . . . RESPONDENTS.

Water Supply—London—"Domestic Purposes"—"Trade Purposes"—Building used solely for Purposes of Trade—Water supplied for Lavatories and Water Closets used by Employees—Payment on Rateable Value—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 16, 20, 25.

A supply of water under the Metropolitan Water Board (Charges) Act, 1907, for water closets and baths of the dimensions stated in s. 25 is to be treated as a supply for "domestic purposes" within the meaning of that section.

Water supplied to a factory under this Act by the Metropolitan Water Board was used for drinking and washing purposes by the workmen employed thereat and for cleansing urinals and water closets provided for their use. No one resided on the premises:—

Held, that the Board were entitled to charge for the water so supplied as for water supplied for "domestic purposes" upon the rateable value of the factory, subject to the rebate allowed by the Act in the case of purely business premises.

Decision of the Court of Appeal [1911] 2 K. B. 38, affirmed.

APPEAL from an order of the Court of Appeal in England. (1)

The appellants carried on the business of ticket manufacturers at a factory in Bermondsey. In June, 1909, the respondents commenced an action against the appellants in the Westminster County Court to recover charges under the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), in respect of water supplied to the appellants' factory from March, 1908, to March, 1909. The question at issue in the action was whether the water so supplied ought to be charged for as water supplied for "domestic purposes" or as water supplied for "purposes other than domestic." The water in question was supplied by meter and was used for cleansing the premises, for the purposes of water closets, sinks, wash-basins, lavatories, and sanitary conveniences provided on the premises by the appellants for the use of their employees, for drinking water for the employees, and for supplying cooling tanks for a gas engine which was worked on the premises in connection with the appellants' business. No person slept upon the premises, nor was any part thereof charged with the payment of inhabited house duty. The annual rateable value of the premises was 520*l.* The respondents claimed to recover from the appellants the sum of 21*l.* 4*s.*, which was made up of 20*l.* 16*s.* for water rates and 8*s.* for the rent of the meter. The 20*l.* 16*s.* was calculated on the footing that the supply of water to the appellants' premises was for domestic purposes, and was based upon a rate of 5 per cent. per annum on the rateable value of the premises in accordance with s. 8 of the Act, subject to a rebate of 20 per cent. as provided by s. 9. The appellants paid into Court the sum of 9*l.* 2*s.* 1*d.*, which was calculated on the footing that the water was supplied for purposes other than domestic and ought to be charged for according to the scale provided in s. 16. (1)

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(1) [1911] 2 K. B. 38.

The county court judge gave judgment for the appellants, the defendants, being of opinion that the supply was for the purposes of their trade or business and not for domestic purposes. The respondents appealed to the Divisional Court (Phillimore and Lord Coleridge JJ.). Phillimore J. agreed with the county court judge that the water was not supplied for domestic purposes, but Lord Coleridge J. differed. In the result the appeal was dismissed. The respondents then appealed to the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.). The Court by a majority (Vaughan Williams L.J. dissenting) allowed the appeal and held that the supply was for domestic purposes and ought to be charged for upon the rateable value of the premises.

C. A. Russell, K.C., and *McCurdy*, for the appellants. The question is whether the water supplied to the appellants was supplied for the purposes of their trade, manufacture, or business or for domestic purposes within the meaning of s. 25 of the Metropolitan Water Board (Charges) Act, 1907. Sect. 8 provides for the supply of water for domestic purposes and fixes the charge for such supply at a rate of 5 per cent. of the rateable value of the house. Sect. 9 provides for a rebate of 20 per cent. where water is supplied under the Act for domestic purposes to any house or building occupied solely for the purposes of any trade or business or of any profession or calling, and being of a rateable value of more than 300*l.* a year. Sect. 16 provides for the supply of water by measure for purposes other than domestic and fixes a scale of charges for such supply based upon the quantity of water supplied. Sect. 20 provides that the Board shall not be bound to supply water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purposes, and in respect of this particular class of premises gives the Board the option of charging by measure or on the rateable value, whichever may be most to their advantage. Sect. 25 provides that for the purposes of the Act the expression "domestic purposes" shall be deemed to include water closets and baths not exceeding a certain capacity, but shall not include (among other things) "the purposes of any trade manufacture or business." The appellants' contention is that the supply of water to their factory is a supply for the purposes of their trade, manufacture, or business, and therefore by the very language of the Act of Parliament itself is excluded from the expression "domestic purposes." The whole supply here is given by meter, and the Board have exercised their option under s. 20 to charge for it upon the rateable value, as for a supply for domestic purposes. No separate charge is made in respect of the gas engine, and the appellants admit that if the Board are right in saying that the supply for the sanitary conveniences was a domestic supply the amount which they seek to recover is the correct amount. So far as the question whether this water is supplied for domestic purposes is a question of fact the finding of the county court judge is in the appellants' favour, but it is really a question of the construction of s. 25, which excludes from "domestic purposes" a supply for the purposes of "any trade manufacture or business." Therefore the question is whether or not the use of this water for sanitary conveniences and for washing is a domestic purpose having regard to the fact that it was used by the workmen employed at the factory. The Public Health (London) Act, 1891, s. 38, requires that every factory shall be provided with suitable and sufficient sanitary conveniences. That is one of the conditions which must be complied with to entitle the occupier to carry on business, and, that being so, the providing of reasonable accommodation for the use of the workmen employed at the factory is part of the business, and the supply of water required for that purpose is a supply for trade purposes. To determine whether a supply is for domestic purposes or not it is not enough to see to what use the water is put, without more, but the question must be determined in relation to the necessities of the person demanding the supply. Thus if water is used for cleansing a dwelling-house, unquestionably that is included in domestic purposes, but if it is used for cleansing a factory, that is part of the carrying on of the business, and the supply for that purpose is a supply for purposes other than domestic. Otherwise the effect is to repeal the distinction between domestic and non-domestic purposes, because, upon the contention put forward by the Water Board, it is difficult to imagine any business premises for which a supply for domestic purposes would not be required, and the result would be in every case to subject the occupier of business premises to the extremely heavy burden of a charge on the rateable value. It is true that s. 9 contemplates that there may be a building occupied solely for business purposes and yet having a supply of water for domestic purposes, but that section does not afford any assistance in determining whether a particular purpose is a trade or domestic purpose. It is not difficult to suggest cases to which s. 9 would apply. For instance, it is not uncommon to provide a kitchen and dining-room in business premises for the purpose of supplying meals to the staff. The supply of water for the cooking of the meals would be a supply for a domestic purpose although the building would not cease to be occupied solely for the purposes of a trade, manufacture, or business. Sect. 9 uses the words "profession or calling," which are not found elsewhere, and if rooms were used by a doctor or an artist solely for the purpose of carrying on his profession they might yet have conveniences which were not connected with the carrying on of his profession. The introductory words of s. 25 were inserted to put an end to a controversy of long standing as to the right of a water company to make special charges beyond the charge on the rateable value in respect of water supplied to bath rooms and for water closets where there were more than one. Those words do not mean that water closets are in all cases to be regarded as domestic purposes, but they are qualified by the subsequent provisions of the section. This case is covered by the principle of *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (1), where it was held that water supplied by the Board for water closets at a railway station for the accommodation of the passengers and of the staff respectively was supplied for railway purposes, which are among the purposes enumerated in the latter part of s. 25, and therefore for purposes other than domestic. That case decides two points: (1.) that although by s. 25 water closets are included in domestic purposes, yet if they come within railway purposes they are not domestic purposes; (2.) that if a railway company, in order to carry on its business properly in the way intended by the Act of Parliament, was bound to provide this accommodation, that was part of the railway purposes. In one sense this is an a fortiori case, because there was there no direct statutory obligation, such as exists here, upon the railway company to provide sanitary conveniences either for the passengers or for the staff. [They also referred to *West Middlesex Waterworks Co.* v. *Coleman.* (2)]

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(1) See note on p. 32, post.

Sir R. Finlay, K.C., *Danckwerts, K.C.*, and *A. B. Shaw*, for the respondents. The construction suggested by the appellants is based upon a misreading of s. 25 and gives no effect to s. 9; and it would have alarming consequences. It must extend to water closets provided in a warehouse or a bank and even in a boarding-house or a school. The true principle is that water closets being required for the accommodation of men as men cannot be included in trade purposes in any sense in which the term is used in the Act, but must come under domestic purposes. No argument can be founded upon the compulsion put upon factories to have appliances of this kind, since there is the same compulsion in the case of dwelling-houses; Public Health (London) Act, 1891, s. 37. It is said that if these appliances are intended for the use of persons brought together for trade, then they cease to be domestic, but s. 9 demonstrates the contrary and contemplates that water may be supplied for domestic purposes to a house

(1) [1910] 2 K. B. 890.

(2) (1885) 14 Q. B. D. 529.

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occupied solely for trade purposes. The rebate was granted to meet the case of premises used solely for business purposes requiring a supply of water for washing and water closets. The appellants' argument fails to deal with that section. "Purposes other than domestic" in s. 16 has reference to the case where the business carried on is one which in the course of the business operations requires water. That construction is fortified by s. 20, which speaks of a supply of water to a house "whereof any part is used for any trade or manufacturing purpose for which water is used." Sect. 25 has been misconstrued by the appellants because they have treated the various items enumerated in the latter part of the section as exceptions from what had gone before. They are nothing of the kind. There is first the positive definition which says that "domestic purposes" shall include certain things—water closets and baths subject to the limitations therein mentioned. Then the section proceeds, not by way of exception, but by way of negative definition, to say that domestic purposes shall not include certain things. None of those things can be regarded as exceptions from water-closets and baths.

Metropolitan Water Board v. *London, Brighton and South Coast Ry. Co.* (1) was distinguished from the present case by the Court of Appeal, and it may be distinguishable; but it is submitted that it was wrongly decided, and that water supplied for water closets, although on a railway, is supplied for domestic purposes. A water closet being an appliance necessary for a person's domestic service, that ends the matter, and it is of no consequence that it is provided for the use of workmen or railway servants or railway passengers.

[EARL LOREBURN L.C. Really the logic applicable to that case and to this seems to be identical. If Mr. Russell is right the opponents of the Water Board ought to have won that case and they ought to win this case, but if he is wrong they ought not.]

"Railway purposes" relates to water required for the working of the railway, and "the purposes of any trade manufacture or business" to water required for the processes of the trade,

(1) [1910] 2 K. B. 890.

manufacture, or business whatever it may be. The question of domestic or non-domestic must be determined not with reference to the premises upon which the user takes place, but with reference to the purpose for which the user is made. This view is supported by the decision of Neville J. under the present Act in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) and is recognized by Farwell L.J. in *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (2); and it is also supported by numerous decisions under earlier Acts framed in similar language: *Barnard Castle Urban Council* v. *Wilson* (3); *South-West Suburban Water Co.* v. *St. Marylebone Union* (4); *Pidgeon* v. *Great Yarmouth Waterworks Co.* (5); *Frederick* v. *Bognor Water Co.* (6); *Chester Waterworks Co.* v. *Chester Union* (7); *Liskeard Union* v. *Liskeard Waterworks Co.* (8); *Smith* v. *Müller* (9); *Cooke* v. *New River Co.* (10)

C. A. Russell, K.C., in reply. The effect of the construction put upon s. 25 by the respondents is to make the latter part of the section contradict the former part. Among the matters specified in the latter part of the section as not being included in the expression "domestic purposes" are public baths and washhouses. There is nothing in the section to limit that to baths which exceed in size the limits mentioned in the earlier part of the section; but if the respondents' construction is correct, that must be qualified by saying "provided that the bath is of a size exceeding that mentioned in the earlier part of the section." That is a plain contradiction of the introductory words. Moreover it is matter of common knowledge that water closets are provided in connection with public baths and washhouses. That again is a contradiction. The cases cited by the respondents are distinguishable because the basis of decision in all those cases was that the water was being supplied to persons who could be regarded as members of the family or as inmates.

(1) [1909] 2 Ch. 666.
(2) [1910] 2 K. B. 890.
(3) [1902] 2 Ch. 746.
(4) [1904] 2 K. B. 174.
(5) [1902] 1 K. B. 310.
(6) [1909] 1 Ch. 149.
(7) (1907) 96 L. T. 566; (1908) 98 L. T. 701.
(8) (1881) 7 Q. B. D. 505.
(9) [1894] 1 Q. B. 192.
(10) (1888) 38 Ch. D. 56; affirmed (1889) 14 App. Cas. 698.

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Earl Loreburn L.C. My Lords, the consideration of this case has been overlaid with a good deal of subtlety; but in itself it raises quite a simple and short point. The question is this: When a factory is equipped with lavatories, water closets, and so forth for the use of the men, required by common sense, or it may be required by law, (it matters not which), is that a supply "for the purposes of trade manufacture or business," or is it "for domestic purposes" within the meaning of this Act?

Now if there were no statutory definition, I should say that it was for domestic purposes; but there is a statutory definition, and therefore we must look and see what it is. The definition of "domestic purposes" is not an exhaustive definition and does not purport to be so. It is couched in slovenly and inaccurate language, but we may take the general sense to be as follows: To begin with, certain things, namely water closets and baths, of particular dimensions, are included as "domestic purposes"; but the expression "domestic purposes" is not to include a supply for the purposes of "trade manufacture or business."

Now, my Lords, I read s. 25 as meaning that a supply for water closets and baths of the dimensions there mentioned is to be treated as a supply for domestic purposes. Even if it were not so, a supply for such purposes as exist in the present case is not a supply for purposes of "trade manufacture or business" at all. I think those words mean a supply for use in the trade, manufacture, or business.

Accordingly, my Lords, without further entering upon an interesting and also extensive field of speculation as to the meaning of this case or that case or the possible difficulties which may arise in other cases which have not in fact arisen, I am content to say that the appeal fails for the reasons I have stated.

Lord Atkinson. My Lords, I concur, and have nothing to add.

Lord Shaw of Dunfermline. My Lords, it is quite true that there may be many cases in modern industry in which a building is occupied exclusively for the purposes of trade, and in which under modern conditions not a few sanitary and other conveniences for the workmen are provided. This statute, my Lords, has not left such cases out of view. Sect. 9 expressly deals with the case of a building which is exclusively occupied for the purposes of trade and business; and yet with reference to such a building it makes provision for a domestic supply of water in such a case.

My Lords, the offer has been made by the respondents in this action to settle with the appellants upon the payment less the discount provided by that section. I cannot myself see how any further offer was competent to the respondents, and I think that it satisfied their duties under the statute.

In my opinion the supply of water for domestic purposes is quite separate and distinct from the supply of water for use in trade or manufacture. That separation in fact is no doubt the reason for the separation in the rate; and the arrangement and conjunction of these two in fact constitute the exact situation to which s. 9 and the provisions there set forth apply.

LORD MERSEY. My Lords, I agree for the reasons which have been stated by the Lord Chancellor, and I think the whole case can be put in a sentence. The real question is whether water used for the mere personal convenience of men employed in a factory can be said to be water used for the purpose of the trade carried on in that factory. In my opinion such a contention is not possible. Such water is not supplied for any trade purpose at all.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 7, 1911.

Solicitors for appellants: *H. H. Wells & Sons.*
Solicitor for respondents: *Walter Moon.*

NOTE.—The material sections of the Metropolitan Water Board (Charges) Act, 1907, provide as follows:—

"8. Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid . . . .

furnish to such owner or occupier . . . . a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required . . . ."

"9. Where under the foregoing provisions of this Act the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement which is assessed to the poor rate or other rate in which such last-mentioned rate is included in a sum exceeding three hundred pounds per annum and is not charged with the payment of inhabited house duty the Board shall make or allow from the water rate payable in respect of such supply a rebate or discount of such amount (not being less than twenty per centum or more than thirty per centum of such water rate) as the Board may from time to time determine and such rebate or discount shall from time to time be made or allowed from the water rate payable in respect of every such supply as aforesaid and at a uniform rate per centum: Provided that in making or allowing such rebate or discount the water rate shall not in any case be less than would have been payable in respect of any house or building or part of a house or building occupied as a separate tenement assessed to the poor rate or other such rate as aforesaid in a sum of three hundred pounds per annum."

"16.—(1) The Board shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of water by measure for purposes other than domestic . . . . afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person as aforesaid) or approved by the Board for measuring and ascertaining the quantity of water so supplied."

[Sub-s. 2 fixed a scale of charges in respect of any supply under the preceding sub-section upon the basis of the amount of water consumed.]

"20. The Board shall not be bound to afford a supply of water otherwise than by measure to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used . . . .

"Provided that where the Board decline to afford otherwise than by measure any such supply as aforesaid they shall if required by the person who but for the provisions of this section would have been entitled to demand such supply furnish to the building in respect of which the supply is required a sufficient supply of water upon and subject to the terms and conditions contained in the section of this Act relating to 'Supply by measure' and subject to the next following proviso (that is to say):—

> "Provided that . . . . the Board may require that the sum to be paid for any such supply by measure shall not be less than the sum which would have been chargeable in respect of such supply had the supply been given under the provisions of this Act which relate to the supply for domestic purposes otherwise than by measure and the charges therefor. . . . ."

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"25. In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include (1) waterclosets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely):—

"Steam gas motor and other like engines;

"Railway purposes;

"Ventilating purposes;

"Working any machine or apparatus;

"Consumption by or washing of horses or cattle:

"Washing carriages or other vehicles;

"Watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus;

"Fountains or any ornamental purpose;

"Cleansing sewers and drains;

"Cleansing and watering streets or roads;

"Fire extinction;

"Flushing drains by means of any apparatus discharging automatically;

"Public pumps baths or wash-houses;

"Any trade manufacture or business;

"Any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

(1) *Sic.*

[HOUSE OF LORDS.]

WARNER (PAUPER) . . . . APPELLANT; H. L. (E.)

AND 1911

COUCHMAN . . . . RESPONDENT. *Nov.* 10.

Employer and Workman—Compensation—Accident arising out of Employment —Frost-bite—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A journeyman baker whose right hand had been injured by frost-bite while driving on his rounds in his employer's cart on a cold day in winter claimed compensation under the Workmen's Compensation Act, 1906. The county court judge found as a fact that the man was not specially affected by the severity of the weather by reason of his employment and refused compensation:—

Held that, there being nothing in the evidence to disentitle the county court judge so to find, his finding was not open to review, and that the injury did not result from accident arising out of the employment.

Decision of the Court of Appeal [1911] 1 K. B. 351, affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the Tenterden County Court under the Workmen's Compensation Act, 1906. (1)

The appellant was a journeyman baker and was at the time of the alleged accident in the employment of the respondent. On the afternoon of December 8, 1909, the appellant set out on his rounds in a baker's cart to deliver bread to the respondent's customers. He was driving the cart. He was wearing gloves, but from time to time had to take off the right-hand glove in order to give change or to write in the customers' books. The cart was provided with an apron which was kept on by a piece of rope. This rope having been cut off before the appellant started on his rounds, he was compelled to hold up the apron with his hand. The weather at the time was very cold, with rain and sleet at intervals. After he had been out about an hour his right hand became very cold and began to ache, and although he rubbed it he could get no circulation. He finished the round with great

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(1) [1911] 1 K. B. 351.

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difficulty. His hand gradually got worse, and he eventually became an out-patient of the East Sussex Hospital, being unable to pursue his ordinary avocation. The appellant filed a request for arbitration, claiming compensation under the Act in respect of this injury.

The county court judge, who was assisted by a medical referee, found as a fact that the injury was caused by something in the nature of a frost-bite. He was, however, not satisfied that the injury was caused by an accident in the popular and ordinary sense of the word, but he did not base his award upon that. Assuming that there was an accident the question arose, was it an accident arising out of the employment? He found that there was nothing in the nature of the appellant's employment which exposed him to more than the ordinary risk of cold to which any person working in the open was exposed on that day, and he therefore made an award in favour of the respondent.

The Court of Appeal (Fletcher Moulton L.J. dissenting) affirmed this award.

Atkin, K.C., and *Graham Mould*, for the appellant. The question is whether the injury to the appellant resulted from an accident arising out of his employment. Unquestionably the appellant was exposed by his employment to the inclemency of the weather to a greater degree than any ordinary person. It was his employment which exposed him to this risk, and, that being so, it is no answer to a claim for compensation to say that other employments would have exposed him to the same risk. The county court judge has therefore misdirected himself. That there was an accident was assumed in the appellant's favour by both the county judge and the Appeal Court, and this is clear upon the authorities. In *Fenton* v. *Thorley & Co.* (1) Lord Macnaghten adopts the view of Lord M'Laren in *Stewart* v. *Wilsons and Clyde Coal Co., Ld.* (2), that if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in this is accidental injury in the sense of the statute. An injury by frost-bite is as much an injury by accident as an injury by

(1) [1903] A. C. 443, 449.

(2) (1902) 5 F. 120.

heat-stroke—*Ismay, Imrie & Co.* v. *Williamson* (1)—or sunstroke: *Morgan* v. *Owners* of *Steamship Zenaida.* (2)

Hemmerde, K.C., and *Addington Willis*, for the respondent, were not called upon.

EARL LOREBURN L.C. My Lords, these cases are difficult enough, and we are apt sometimes to forget that what is decided in the county court is much more often a question of fact than a question of law; and if it is a question of fact, then it is for the county court judge to decide it.

There cannot be imagined a more difficult part of this difficult Act to determine than that which relates to injuries by accident arising out of and in the course of a man's employment. In the present case the only thing decided in the Court of Appeal was that they would not disturb the finding of the learned county court judge upon the question of whether this injury by accident arose out of the employment.

Now Fletcher Moulton L.J., who was the judge in the minority in the Court of Appeal, stated the law fairly enough, or rather stated what was the point of view with which a judge ought to approach cases of this kind. He said (3): "It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment, or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment."

When I turn to what the learned county court judge says, it may be possible,—it is indeed possible,—by a process of verbal criticism to apply the same kind of canon to these words as used in the old days to be applied by special demurrer to the pleading of either the plaintiff or the defendant. In substance the learned county court judge seems to me to have found that in this case the man was not specially affected by the severity of

(1) [1908] A. C. 437.

(2) (1909) 25 Times L. R. 446.

(3) [1911] 1 K. B. 357.

the weather by reason of his employment. It is quite unnecessary to scan with minuteness every phrase which he uses; but in substance I think that is what he decided. If so, I see nothing in the evidence which disentitled him to find that fact; and being so found as a fact, it is binding.

I will only say this further: To be perfectly strict and accurate, it is somewhat lax to speak of this statute as though it referred to an accident. I am perfectly conscious that I myself, as well as others, have fallen into that lapsus linguæ; but at times it may be apt to confuse one's idea of what is enacted in this particular Act of Parliament. The Act of Parliament does not speak of an accident—it speaks of "injury by accident arising out of and in the course of the employment." I shall move your Lordships to dismiss this appeal.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, the findings of the learned county court judge are really two in number. First, negatively, he has found that this unfortunate workman was not injured by accident arising out of his employment. Secondly, positively, he has found that being set to ordinary outdoor work he was injured by the severity of the weather. Both of these findings, my Lords, are findings of fact. I do not think that it is the province of a Court of Appeal to disturb such findings. I agree in the course proposed.

LORD MERSEY. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, November 10, 1911.

Solicitors for appellant: *Langham, Son & Douglas.*
Solicitors for respondent: *Griffith & Gardiner.*

[HOUSE OF LORDS.]

HANAU . . . . APPELLANT;

AND

EHRLICH . . . . RESPONDENT.

H. L. (E.)
1911
Dec. 4.

Contract—Memorandum in Writing—Agreement not to be performed within a Year—Agreement of Service for Definite Period exceeding One Year—Provision for Determination by Notice by either Party within One Year—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A contract of service or employment for a definite period exceeding one year, but subject to determination by six months' notice by either party during that period, is an agreement not to be performed within a year within s. 4 of the Statute of Frauds and requires a memorandum thereof to be in writing.

Dobson v. *Collis* (1856) 1 H. & N. 81, followed.

Decision of the Court of Appeal, [1911] 2 K. B. 1056, affirmed.

APPEAL from an order of the Court of Appeal affirming an order of A. T. Lawrence J. (1)

The appellant was the plaintiff and the respondent the defendant in an action brought in the High Court for damages for breach of contract. By consent an order was made by a Master referring all matters in dispute in the action to the award of a practising barrister. The arbitrator made his award in the form of a special case. He found as a fact that the agreement relied upon by the appellant was an agreement for the employment of the appellant for a period of two years, subject to six months' notice on either side during that period, and that there was no memorandum in writing containing all the terms stated by the appellant in his evidence as constituting the agreement between himself and the respondent, and that the document referred to by the appellant in his statement of claim and in his evidence was not signed. The question submitted for the opinion of the Court was whether upon the facts so found this agreement was or was not within the Statute of Frauds (29 Car. 2, c. 3), s. 4.

A. T. Lawrence J. answered this question in the affirmative and his decision was affirmed by the Court of Appeal.

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(1) [1911] 2 K. B. 1056.

Atkin, K.C., J. H. M. Campbell, K.C., and *Colefax*, for the appellant. The question is whether an agreement to employ a man for two years subject to six months' notice on either side is an agreement "not to be performed" within a year within s. 4 of the Statute of Frauds. Upon the authorities that means a contract which cannot by possibility be performed by either party within a year: *McGregor* v. *McGregor* (1), following *Peter* v. *Compton* (2) and *Fenton* v. *Emblers*. (3) Accordingly a separation agreement whereby the husband agreed to allow the wife a weekly sum for maintenance (*McGregor* v. *McGregor* (1)) and an agreement to leave a man money by will (*Fenton* v. *Emblers* (3)) have been held not to be within the statute; and an agreement to maintain a child for life (*Murphy* v. *O'Sullivan* (4)) has been held not to be within the corresponding Irish statute. The general principle is again stated by Lord Romilly in *Ridley* v. *Ridley*. (5) Tested by that principle this agreement is not within the statute, for it is an agreement which might be performed within the year inasmuch as six months' notice might be given on either side. Side by side, however, with these authorities are some cases which undoubtedly proceed on the footing that where there is a contract for a term of years, subject to the right of the parties to put an end to the contract within a year, that is a contract subject to a defeasance and is a contract not to be performed within a year within the meaning of the statute: *Birch* v. *Earl of Liverpool* (6); *Dobson* v. *Collis*. (7) But to treat the so-called defeasance as something apart from the contract is illogical and inconsistent with the principle by which the statute has been construed. If either party exercises the option which the contract gives him he is performing the contract. The test is, when is the performance to take place, and if in any event the contract can be performed within a year it is not within the statute. To assume that this is a contract not to be performed within a year is to disregard the express terms of the contract itself. *Dobson* v. *Collis* (7) was approved by Turner L.J. in

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(1) (1888) 21 Q. B. D. 424.

(2) (1693) Skin. 353; 1 Sm. L. C. (11th ed.) 316.

(3) (1762) 3 Burr. 1278.

(4) (1866) 11 Ir. Jur. (N.S.) 111.

(5) (1865) 34 L. J. (Ch.) 462.

(6) (1829) 9 B. & C. 392.

(7) 1 H. & N. 81.

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Ex parte Acraman (1), and in *Lavalette* v. *Riches & Co.* (2) Vaughan Williams L.J. adopts the same view of the law, but those dicta are obiter only. The main line of decisions is right, and *Dobson* v. *Collis* (3) and that line of authorities are a direct violation of the principle by which the statute has been construed and ought to be set aside.

Dickens, K.C., Danckwerts, K.C., and *Bremner,* for the respondent, were not called upon.

EARL LOREBURN L.C. My Lords, the point here is as to the construction to be placed upon the Statute of Frauds, which after the lapse of 200 years and more seems still to be open to some question.

Mr. Atkin on behalf of the appellant quoted authorities to shew that the words of the Act deal only with agreements which cannot be performed by either party within a year. On the other hand, there is a chain of authorities since 1829, upon which the Court of Appeal relied, and which undoubtedly support in a direct way the conclusion at which they have arrived. I think these two series of decisions can both be reconciled, or rather I ought to say can both be applied, by regarding the one as an exception to the other.

If you are to look at the words of this statute without any previous guidance at all, to my mind either construction contended for is possible as a matter of language and pure interpretation of the meaning of language. But I agree with Vaughan Williams L.J. that it is not right for even this House to reopen points of construction upon ambiguous language which have been settled for a long period of years; and I advise your Lordships to decide this case upon that ground. To my mind, when doubtful words in a statute have for a long period been decided in a particular sense, we ought not to reopen the matter if we can help it. The doctrine "Interest reipublicæ ut sit finis litium" ought in such a case to apply.

LORD ALVERSTONE. My Lords, I entirely agree with the motion made by the Lord Chancellor.

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(1) (1862) 31 L. J. (Ch.) 741.

(2) (1907) 24 Times L. R. 2.

(3) 1 H. & N. 81.

It seems to me that it is quite impossible in the present day to deal with this statute as though we were considering it for the first time. It has been said that the view taken by the Court of Appeal, which your Lordships are prepared to indorse, is not logical having regard to certain exceptions founded upon *Peter* v. *Compton.* (1) My Lords, one has had to think over this point a good many times in the course of one's legal career, and it seems to me, and it has always seemed to me, that the two things can stand together. I put it in this way. The one class of cases decides that if there is no mention of time, and the time is uncertain, the agreement is not within the statute. The other class of cases decides that if the time mentioned is more than one year, but there is power to determine, the agreement is within the statute. I have never been able to see why that is not a perfectly good working construction for this statute.

But, my Lords, I entirely concur with the main reason given by the Lord Chancellor a few moments ago for refusing this appeal. This point was in terms decided in the year 1856, and decided with reference to this very identical contract—a contract of service for a certain number of years determinable on six months' notice. I am sure I am not exaggerating when I say that hundreds and thousands of such contracts have been made since, and that whenever they have come before the Courts, although they have not gone beyond nisi prius, the ruling has been that they are required to be in writing; and it would be, I think, a very serious thing for your Lordships to upset the course of decision, when, as it seems to me, without inconsistency the two classes of authority can fairly be said to stand together.

I do not feel much pressed by the reasoning of Fletcher Moulton L.J., although I can quite see that if there were an absolutely clean slate it might be possible to construe the statute somewhat differently.

I concur with the Lord Chancellor's motion that the appeal should be dismissed.

Lord Atkinson. My Lords, I concur, on the short ground that I think the language of this statute is ambiguous, and that it is questionable whether the determination of a contract by merely giving notice within a year can be called a performance of the contract within that year. If not, its duration must be determined with regard not to this but to the other provisions it contains.

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(1) Skin. 353; 1 Sm. L. C. (11th ed.) 316.

That being so, my Lords, I entirely concur with what has been said by my noble and learned friend on the woolsack, that where the language of a statute is ambiguous and one finds that a particular construction has been put upon it by a number of authorities, extending over a great length of time, it would be unwise and wrong on our part to adopt a different construction.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 4, 1911.

Solicitors for appellant: *Michael Abrahams, Sons & Co.*
Solicitors for respondent: *Spyer & Sons.*

[HOUSE OF LORDS.]

H. L. (E.)
1911
Dec. 11.

BARNES (PAUPER) . . . . APPELLANT;

AND

NUNNERY COLLIERY COMPANY, LIMITED RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment — Fatal Accident — Prohibited Act — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1., *sub-s.* 1.

A boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking as he ought to have done, and in the course of the journey his head came in contact with the roof of the mine and he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible. Upon a claim by the father for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the accident arose out of the deceased's employment:—

Held, that there was no evidence to justify this finding, and that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved by his contract of service.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal setting aside an award made by the judge of the Sheffield County Court under the Workmen's Compensation Act, 1906, in favour of the appellant.

The appellant filed a request for arbitration, claiming compensation from the respondents as a dependant in respect of the death of his son.

The following statement of facts is taken from the judgment of Lord Mersey.

William Francis Barnes, a boy of seventeen, was employed at the Nunnery Colliery as a "clamper." On the early morning of May 2, 1910, he and three other boys, Greaves, Bell, and Thackeray, were starting for the end of a level, known as 5 South Level, where they were to work. This place, which was some distance from the spot where they were gathered together, ought, in the proper course of work, to have been approached on foot. But there existed near to the footway an endless rope carrying tubs to the lower part of the mine. This rope was about to start. It had thirty-eight empty tubs attached to it and was in charge of Greaves, who sat in the front tub. At the moment of starting the other three boys, of whom the deceased was one, got into the tub in which Greaves was seated in order that they might ride to their work instead of walking. The train was then started by Greaves. After it had travelled about half a mile the head of the deceased came in contact with the roof of the mine, with the result that he was killed. The other boys, who had probably travelled in this way before, avoided the danger by stooping in the tub. It appeared that the deceased had not previously ridden in the tub, and that he had only been in the employment of the colliery company about three weeks. The evidence shewed that it was quite a common practice for boys to ride in the tubs in order to get to their work, but it also appeared that the use of the tubs for this purpose was forbidden, and that notices to this effect were placed at the pit bottom and in the lamp-room. There was also a special rule of the colliery—rule 90—forbidding men to use the tubs. All the boys, including the deceased, knew that they ought not to ride in the tubs, and boys in fact never did ride in them if any deputy or official of the colliery could see them; they then walked.

The county court judge said that serious and wilful misconduct was not an answer to the claim, because the boy was killed, and that the respondents were thrown back on the argument that the accident did not arise out of and in the course of the employment; that the deceased did not ride for his own pleasure but for the object of his employers; that he had to get down the incline; that there was no reason to assume that he knew of the danger; and he made an award in favour of the applicant.

The Court of Appeal by a majority (Cozens-Hardy M.R. and Farwell L.J., Fletcher Moulton L.J. dissenting) ordered that this award should be set aside and an award entered in favour of the respondents upon the ground that the accident did not arise out of the deceased's employment.

1911. Nov. 6. *Waddy* and *V. M. Coutts-Trotter*, for the appellant. The facts are for the county court judge, and there is ample evidence to support his finding. Although a workman does an act which is wholly unauthorized, that will not prevent the accident from arising out of and in the course of his employment: *Robertson* v. *Allan Brothers & Co.* (1); *Douglas* v. *United Mineral Mining Co.* (2) Cozens-Hardy M.R. in *Brice* v. *Edward Lloyd, Ld.* (3) was wrong in saying that the test was whether the man was acting within any authority which he had. Unless it can be shewn that the action of the deceased amounted to an actual quitting of the employment the decision of the Court of Appeal is wrong. The most that can be said here is that the boy was using the wrong part of the right road. *Robertson* v. *Allan Brothers & Co.* (1) was approved by this House in *Moore* v. *Manchester Liners, Ld.* (4) [They also referred to *Marshall* v. *Owners of S.S. Wild Rose.* (5)]

Scott Fox, K.C., and *T. E. Ellison*, for the respondents. The test is whether the risk which the boy incurred was a class of risk incidental to his employment. Riding in tubs formed no part of any employment in this mine. All the boys were breaking the rules. Where, as here, every legitimate precaution is used to stop the practice, then an accident arising out of that practice is an accident arising out of the defiance of the rules and not out of the employment. The deceased by his own conduct was exposing himself to a new risk which was not connected with his employment: *McDaid* v. *Steel* (6); *Morrison* v. *Clyde Navigation Trustees.* (7)

Waddy replied.

The House took time for consideration.

Dec. 11. EARL LOREBURN L.C. My Lords, the more I see of these cases under the Workmen's Compensation Act, the more I feel that nearly all of them are in reality pure questions of fact, in regard to which the only function of a Court is to interpose when there is no evidence to support a particular finding.

(1) (1908) 77 L. J. (K.B.) 1072.
(2) (1900) 2 W. C. C. 15.
(3) [1909] 2 K. B. 804.
(4) [1910] A. C. 498.
(5) [1910] A. C. 486.
(6) (1911) 48 Sc. L. R. 765.
(7) (1908) 46 Sc. L. R. 40.

The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct. An arbitrator has to ask himself, was the injury by accident caused by something reasonably incidental to the employment, by some risk to which a workman, liable like other men to be careless and take short cuts, might be exposed in doing what he had to do?

The difficulty really is in applying this to the particular case. You cannot say that this boy was employed to be prudent and cautious, and therefore deny him compensation if by reason of his want of prudence and caution he meets with an accidental injury. Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment.

I mean that I should say so if I were a judge of the fact, for it is purely a question of fact. And where the county court judge has decided it, a Court of law has no right to set the award aside unless it is satisfied that there was no evidence which could justify such a conclusion. It is like the case of a judge ruling that there is no case to go to the jury.

The Court of Appeal has by a majority come to the view, for such it is in effect, that there was no evidence, and your Lordships take the same view. I am not prepared to differ. It is not by comparing the facts of one case with the facts of other cases and reasoning by analogy from the comparison that a safe conclusion can be reached, but by considering each time the meaning of the Act.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment of my noble and learned friend Lord Mersey, in which the facts are sufficiently set out, and I concur in it. The judgment of the Court of Appeal was, I think, right. The county court judge is, in such cases as this, the sole judge of fact, and where evidence is given before him upon which he could as a reasonable man find on any issue of fact, his decision must be upheld, but where all the evidence given before him clearly shews that the injury causing the workman's death was the result of a risk not incidental to the workman's employment, then his finding that the injury did arise out of the employment binds nobody, because it is a finding made without any evidence to support it and cannot be allowed to stand. From the rather scanty and disjointed note printed at p. 16 of the appendix it is not very clear what were the grounds upon which the county court judge based his judgment. There is one item in the note going to shew that the ratio decidendi was, that because the deceased was bound, according to the terms of his employment, to proceed from the engine plane down the incline to No. 5 South Level, he was riding in his tub for the objects of his employer, not for his own pleasure, and, therefore, that an accident arising from his travelling in the tub was an accident arising out of and in the course of his employment within the meaning of the statute. The item runs as follows: "Did not ride for his own pleasure, but for object of his employers. Had to get down the incline. No reason to assume he knew of danger."

I quite agree that an employer should not be permitted to shield himself from liability by merely posting up a notice prohibiting some practice in his works, when he has tacitly permitted the practice to be followed; "winked," as it is called, at the disregard of his orders. But that is not the case here.

John William Greaves deposed not only that "there was a notice-board at pit's bottom forbidding us, and at lamp-room, and there is a special rule of the colliery, rule 90" (prohibiting, I presume, the riding in these tubs), and that all the clampers knew they ought not to ride in the tubs; and again, that it was always the practice to ride if no deputy or official was about; but that if a deputy or official was about then the boys walked, and that one or two have been fined for riding. The evidence of this and the succeeding witness, Arthur Bell, is, no doubt, to the effect that boys were in the habit of riding in these tubs, but there is not a particle of evidence, not a suggestion, in the case to shew that the managers or any officials of the mine ever permitted or connived at the practice. The county court judge has not, either expressly or by implication, found that anything of the kind ever took place. The deceased had been in this employment for three weeks before his death. From the passage in Greaves' evidence at p. 13, between A and B, it would appear that the deceased was during this time employed as a clamper. The county court judge has found that he had never ridden before. It is difficult to suggest what an employer could reasonably be required to do to enforce rules prohibiting a certain practice which the employers omitted to do in this case, to prevent the practice of riding in these tubs being indulged in. Wilful misconduct is out of the case since death ensued, and, indeed, its existence cannot in any case help to a decision as to whether an injury by accident arose out of or in the course of a workman's employment; so that whether the deceased knew of the danger he was running or did not know of it is irrelevant.

In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well be held in most cases rightly to be a risk incidental to his employment. Not so in the other case. For example, if a master employs a servant to carry his (the master's) letters on foot across the fields on a beaten path, or on foot by road to a neighbouring post office, and the servant, having got the letters, went to the stables, mounted his master's horse, and proceeded to ride across country to the post office, was thrown and killed, or went to his master's garage, took out his motor car, and proceeded to drive by road to the post office, came into collision with something, and was killed, it could not be held, I think, according to reason or law, that the injury to the servant arose out of his employment, though, in one sense, he was about to do ultimately the thing he was employed to do, namely, to bring his master's letters to the post. In such a case the servant puts himself into a place he was not employed to be in, and had no right to

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be in—the back of his master's horse, or the seat of his master's motor car. He was doing a thing he was not employed to do, and had no right to attempt to do, namely, to ride his master's horse across country or to drive his motor car. These were altogether outside the scope of his employment. He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it. The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test. It has been many times adopted. There was not, therefore, to my mind any evidence that the injury the deceased received arose out of his employment, and if the finding of the county court judge amounts to a finding that it did, it cannot, I think, be sustained.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

LORD MERSEY. My Lords, the question in this case is whether the injury which caused the death of the deceased boy arose out of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906. Before this question can be answered it is necessary to ascertain with accuracy the facts of the case. [His Lordship stated the facts as above set out, and continued :]

These being the facts, the Court of Appeal (the Master of the Rolls and Farwell L.J., Fletcher Moulton L.J. dissenting), overruling the judgment of the learned county court judge, held that the accident could not be said to arise out of the deceased's employment. I think the judgment of the majority of the Court of Appeal was right, and that there was no evidence on which the county court judge could reasonably find as he did. It was no doubt part of the duty of the deceased to find his way down the mine to the place where he was to work, but it was not, in my opinion, incidental to the performance of that duty that he should get into the tub. When riding in the tub he was not only violating the conditions of his employment, but was engaged in an act quite outside its scope. I find it impossible to say that an accident which results from an act so done can in any proper sense be said to arise out of the employment. He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all.

It is true that the learned county court judge states, in the note of his judgment, that there was no reason to assume that the boy knew of the danger he was running. This may be true; but there is no evidence one way or other on the point. But it is immaterial. He knew that he was forbidden to ride in the tub, and that, in my opinion, is enough. The learned judge also finds that the boy was not riding for his own pleasure but for the object of his employers. For my part I think he was riding for his own pleasure, but this again is immaterial, and for the same reason.

It is no doubt true that one object which he had in view in getting into the tub was to reach his work, but the intention existing in his mind cannot, in my opinion, convert the forbidden act into a part of his employment. It is not as if the case had been one of emergency where the boy might have had a discretion to use the perhaps speedier, although the forbidden, means of reaching his destination. Nor is it as if the rule forbidding the act was notoriously disobeyed or not enforced. It was disobeyed, no doubt, but it was disobeyed surreptitiously and unknown to the employers. The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition. The case falls within the authority of *Brice* v. *Edward Lloyd, Ld.* (1) and is governed by it. It is not like that of *Robertson* v. *Allan.* (2) In the latter case the Master of the Rolls pointed out that the violation of the rule against the use of the skid for reaching the

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(1) [1909] 2 K. B. 804.

(2) 77 L. J. (K.B.) 1072.

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vessel was "winked at" by the employer; in other words that it was not a prohibition at all.

For these reasons I think the appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, December 11, 1911.

Solicitors for appellant: *H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Parker Rhodes & Co., Rotherham.*

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H. L. (E.)
1911
Dec. 4.

DE BEERS CONSOLIDATED MINES, LIMITED . . . . APPELLANTS;

AND

BRITISH SOUTH AFRICA COMPANY . RESPONDENTS.

Mortgage—Clog on Equity of Redemption—Debentures—Floating Charge.

By an agreement made between the plaintiff company and the defendant company, after reciting that the plaintiff company contemplated an issue of mortgage debentures, it was agreed that an existing advance made by the defendant company to the plaintiff company under a prior agreement should remain outstanding until the issue of the debentures and that debentures for the amount of the advance should be accepted by the defendant company in satisfaction of the debt; that the debentures should be secured by a floating charge on the plaintiff company's undertaking; that the defendant company should make a further advance of a fixed amount to the plaintiff company against debentures for that amount; and that in consideration of the assistance thus rendered and to be rendered the plaintiff company should grant to the defendant company an exclusive right to work in perpetuity all the diamondiferous ground in the territories of the plaintiff company. The further advance was made and debentures in accordance with the agreement were issued by the plaintiff company to the defendant company for the total amount of the advances. These debentures had since been paid off, but the defendant company insisted upon the grant of the mining licence. The plaintiff company impeached the validity of the stipulation for a licence on the ground that it was a clog on the equity of redemption under the debentures:—

Held, upon the construction of the agreement, reversing the judgment of the Court of Appeal, [1910] 2 Ch. 502, that it imposed upon the plaintiff company an absolute and immediate obligation to grant a licence but no absolute or immediate obligation to issue debentures; consequently that the stipulation for the licence was not part of the mortgage transaction and was not a clog on the equity of redemption.

Whether the doctrine against clogging the equity of redemption applies to debentures secured by a floating charge, quære.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Swinfen Eady J. (2)

The facts of the case are fully stated in the judgment of Lord Atkinson. The following short summary of the facts is sufficient to shew the nature of the dispute between the parties.

The appellants, hereinafter referred to as De Beers, were a company incorporated under the Limited Liability Laws of the Colony of the Cape of Good Hope, having its head office in Kimberley. The respondents, hereinafter called the Chartered Company, were a company incorporated by Royal Charter dated October 29, 1889, which prohibited the company from granting any monopoly of trade. The Chartered Company owned lands believed to be diamondiferous in Northern and Southern Rhodesia, but up to the present time no diamonds had actually been found thereon. Under two agreements dated April 20, 1892, and December 7, 1892, De Beers from time to time advanced to the Chartered Company sums amounting in the aggregate to 212,000*l.*, and in pursuance of the December agreement De Beers accepted in respect of these advances mortgage debentures of the Chartered Company of the nominal value of 212,200*l.* secured by a floating charge on the company's undertaking. These debentures had long since been paid off and nothing was now due from the Chartered Company to De Beers.

By the December agreement the Chartered Company in consideration of the assistance rendered and to be rendered by De Beers to the Chartered Company under that and the prior agreement agreed to grant to De Beers an exclusive licence to work in

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(1) [1910] 2 Ch. 502.

2) [1910] 1 Ch. 354.

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perpetuity all the diamondiferous ground in the Chartered Company's territories.

After payment off of the debentures De Beers claimed to be entitled to a grant of this exclusive licence. The Chartered Company thereupon commenced an action in the Chancery Division to impeach the validity of the agreement for a licence on the grounds (1.) that it was ultra vires their charter; (2.) that it was a clog upon the equity of redemption under the debentures. De Beers counterclaimed for specific performance of the agreement.

The question of the clog turned primarily upon the question whether upon the construction of the December agreement the stipulation as to the licence and the stipulations as to the issue of debentures were parts of one transaction or were separate and independent transactions. The material provisions of this agreement are sufficiently set out in Lord Atkinson's judgment. The charter and the agreements of April and December are also set out in extenso in the report of the case before Swinfen Eady J.

Swinfen Eady J. and the Court of Appeal held that the proper law of the agreements was English and not Roman-Dutch, and that by English law the stipulation as to the licence was void as being a clog on the equity of redemption; but they held further that the licence was not a monopoly of trade within the prohibition in the charter; and they gave judgment for the respondents upon the claim and counter-claim.

1911. July 3, 4, 6, 17. *Upjohn, K.C., Jenkins, K.C.*, and *J. W. M. Holmes*, for the appellants. Assuming that the agreement of December 7, 1892, is governed by the law of England, this transaction does not fall within the doctrine against clogging the equity of redemption, first, because this was not a mortgage transaction to which the doctrine has any application, and, secondly, because, assuming that it was, upon the construction of the agreement the stipulation for a mining lease was independent of the mortgage transaction. As to the first point, hitherto this equitable doctrine has only been applied to a mortgage in the ordinary sense of the term; that is to say, a mortgage of specific property whereby to the extent of the charge the mortgagor has been deprived of the ownership of the property and the power of disposing of it. The property charged may be real or personal, including in personal property shares and debentures, and the mortgage may be legal or equitable, but it must be a mortgage of specific property. The doctrine has no application to the issue of loan capital by a commercial company upon the terms found in the trust deed in this case. These debentures are to be secured by a floating charge upon the undertaking of the Chartered Company and the company is to be at liberty to deal in the course of business with its assets until the time comes for enforcing the charge. The debentures contain no fixed time for payment, but the company may give six months' notice of its intention to pay off, and at the end of that time the principal moneys become payable with a bonus or premium of 10 per cent. The other events in which the principal moneys become payable are, stated shortly, if the company makes default or if it comes to an end. That is not an ordinary mortgage to which the doctrine applies, but belongs to a totally different class of commercial transactions of recent origin. The observations of Lord Halsbury and Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (1) shew that this doctrine ought not to be extended beyond the cases to which it has always been applied. The doctrine was invented in the seventeenth century to prevent fraud and oppression: *Talbot* v. *Braddill* (2); *Mellor* v. *Lees* (3); *Toomes* v. *Conset* (4); *Vernon* v. *Bethell* (5); but it has now become crystallized into an absolute law of property and is quite independent of any circumstance of that kind. It has no foundation in reason and frequently operates to defeat a fair bargain made by parties negotiating at arms' length and on equal terms. Many of the incidents of these commercial transactions run at right angles to this doctrine against clogging. For example, it is an established practice of limited companies to issue irredeemable debentures. If the doctrine applies to those securities they must be void, inasmuch as the doctrine prevents a mortgage from being irredeemable, for redemption is of the very essence of a mortgage as mortgages are understood in equity: *Noakes & Co., Ld.* v. *Rice* (1); and see *Talbot* v. *Braddill* (2); *Morgan* v. *Jeffreys*. (3) For many years the validity of irredeemable debentures was not doubted, but at length it was suggested that they might be open to question by reason partly of the doctrine against clogging and partly of the law against perpetuities. That doubt was, however, removed by s. 14 of the Companies Act, 1907 (re-enacted by s. 103 of the Companies (Consolidation) Act, 1908), which declared that a condition making debentures irredeemable should not invalidate the debentures. Again, it is common practice to insert in debentures a stipulation, such as exists in the debentures in this case, that they shall be paid off at a premium. But if these are mortgage transactions to which the doctrine applies that stipulation is at variance with the doctrine, which says that when the mortgage is paid off the mortgagee is entitled to nothing beyond his principal, interest, and costs: *Noakes & Co., Ld.* v. *Rice*. (1) Further, the expression "equity of redemption" is not apt as applied to an issue of debentures creating merely a floating charge, at any rate until the charge ceases to float and a receiver is appointed, for until the time comes for enforcing the security it cannot be said whether any property will be subject to the charge. These floating charges are a modern creation—their validity was first established less than half a century ago by *In re Marine Mansions Co.* (4) and *In re Panama, New Zealand, and Australian Royal Mail Co.* (5)—and in considering whether this doctrine ought to be extended to an entirely new class of transactions where there is no suspicion of fraud or oppression weight will be given to the fact that it violates the great principle of freedom of contract: *Albion Steel and Wire Co.* v. *Martin*. (6)

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(1) [1904] A. C. 323.
(2) (1683) 1 Vern. 183.
(3) (1742) 2 Atk. 494.
(4) (1745) 3 Atk. 261.
(5) (1762) 2 Eden, 110.

As to the second point, upon the construction of the agreement of December 7, 1892, there was no obligation upon the Chartered Company to issue debentures; nothing beyond a contemplation that they would do so. If they did issue debentures, the De

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(1) [1902] A. C. 24.
(2) 1 Vern. 183.
(3) [1910] 1 Ch. 620.
(4) (1867) L. R. 4 Eq. 601.
(5) (1870) 5 Ch. 318.
(6) (1875) 1 Ch. D. 580, 584.

Beers Company were bound to accept them in respect of the existing debt of 112,000*l.* and the further advance of 100,000*l.*; but if they did not choose to issue debentures, the De Beers Company remained unsecured creditors for the existing debt and were not bound to make the further advance. But in clause 6 there was an immediate binding obligation on the Chartered Company to grant a mining lease to De Beers in consideration of the assistance rendered and to be rendered by the latter to the former. It matters not whether the charge was created at the date of the trust deed or at the date of the issue of the debentures; whichever date is taken the charge did not affect the mining lease, but only the reversion expectant on the lease. The two transactions were not contemporaneous and were independent transactions, and upon this question it is immaterial whether the collateral bargain which is impeached is antecedent or subsequent to the mortgage transaction. The bargain for the lease in this case operated before the relationship of mortgagor and mortgagee was created and was no part of the mortgage security, and therefore it could not be a clog on the equity of redemption. In *Drew* v. *Power* (1) it was held that a beneficial lease granted as an inducement to the lessee to lend money to the lessor was void, but that decision was founded upon the usury laws, which have been long since repealed, and has nothing to do with the doctrine against clogging. Even if De Beers had refused, when the time came, to make the further advance or to take up the debentures, that refusal would be no answer to an action for specific performance of the agreement for the lease, because a merely partial failure of consideration is not a bar to such an action: *Oxford* v. *Provand.* (2) *Bradley* v. *Carritt* (3), which may be called the high water mark of the doctrine, has no bearing on the present case. Admittedly in that case there was a mortgage of specific shares and the question was whether the shares were prejudicially affected by the collateral bargain. Here the question is whether the lease was the subject of the mortgage at all.

Sir Robert Finlay, K.C., Levett, K.C., W. E. Hollams, and *G. H. Allen,* for the respondents. The doctrine against clogging

(1) (1803) 1 Sch. & Lef. 182.
(2) (1868) L. R. 2 P. C. 135.
(3) [1903] A. C. 253.

the equity of redemption is this, that when the transaction is one of loan secured by a charge on property, whether real or personal, and whether it be a floating charge or a charge on one definite thing, there cannot be in the same transaction any stipulation which will prevent the borrower on paying off the loan from getting back the property charged in the same condition as that in which it was at the time of the transaction. It must be in the same transaction: *Noakes & Co., Ld.* v. *Rice* (1); but that does not necessarily mean at the same moment; if in substance it is one transaction the doctrine applies: *Browne* v. *Ryan.* (2) In this case the crucial date is not, as the appellants suggested, the date when the debentures were created, but the date of the agreement of December, 1892. At that time there was an agreement for a security which in equity was as good a charge as if a trust deed had been executed at that moment, and, there being in that instrument a stipulation which prevents the property on redemption coming back to the borrower in the same state, that is a clog on the equity of the redemption. Upon the appellants' construction this 112,000*l.* would remain unsecured and the property might have been dissipated before the debentures were issued. The doctrine against clogging has been four times affirmed by this House. It is a vicious mode of argument to say that it was originally designed to prevent oppression and that there is no danger of oppression in this case, for it applies to all cases. The observations of Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (3) were addressed not to this doctrine, which he says is perfectly sound, but to the rule that there shall not be in the contract of lending any condition that the lender may purchase the mortgaged property. That rule, no doubt, is connected with the doctrine against clogging, but he treats it as a separate rule. The point made by the appellants as to irredeemable debentures has no bearing on the case; it is a mere question of words. An irredeemable debenture is not really a debenture at all. It is not an instrument to secure a loan of money, but is an instrument conferring a perpetual annuity

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(1) [1902] A. C. 24.

(2) [1901] 2 I. R. 653.

(3) [1904] A. C. 323.

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in consideration of a payment of money made at the time of issue. Then it is said that this antiquated rule of equity ought not to be applied to a commercial transaction of this character. But the commercial understanding is universal that a debenture is an instrument giving a security for a loan, and, if there is a rule with reference to charges securing a loan, it applies to debentures just as much as to charges on land. To say that the security is a floating one is irrelevant. There is a charge on the whole of the property from the time of the agreement to give the debentures, and the mere fact that the mortgagor is at liberty to deal with the mortgaged property in the course of his business makes no difference with regard to the nature of the charge; the only difference is that when the charge is enforced it attaches to the property as it then exists: *In re Florence Land and Public Works Co.* (1); *In re Standard Manufacturing Co.* (2); *Simultaneous Colour Printing Syndicate* v. *Foweraker.* (3) The principle that on redemption the borrower is entitled to have back the property as it was applies equally whether the charge is floating or not. The test is, Is there a right of redemption? There is none the less a right of redemption because the subject-matter of the charge is constantly changing; and upon redemption the borrower is entitled to have back the mortgaged property in its then condition freed from any clog. Then it is said that the application of the doctrine to these commercial transactions would render the payment of any premium illegal; but the observations of Lord Davey in *Noakes & Co., Ld.* v. *Rice* (4) and *Bradley* v. *Carritt* (5) shew that a mortgage may provide for the payment of a bonus or premium. That therefore is not within the mischief of the doctrine.

Upjohn, K.C., in reply, referred to *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (6), *Illingworth* v. *Houldsworth* (7), and *Evans* v. *Rival Granite Quarries, Ld.* (8), as to the meaning of a floating charge.

Counsel for the respondents then contended that clause 6 of the agreement was ultra vires inasmuch as it purported to grant a monopoly of trade contrary to clause 20 of their charter.

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(1) (1878) 10 Ch. D. 530.
(2) [1891] 1 Ch. 627.
(3) [1901] 1 K. B. 771.
(4) [1902] A. C. 24, 33.
(5) [1903] A. C. 253, 266.
(6) [1897] A. C. 81.
(7) [1904] A. C. 355.
(8) [1910] 2 K. B. 979.

EARL LOREBURN L.C. intimated that the House disagreed with this contention, being of opinion that clause 6 of the agreement did not grant any monopoly of trade, and would take time to consider the question whether the clause was void as being a clog on the equity of redemption.

Dec. 4. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal dated July 5, 1910, affirming a judgment of Swinfen Eady J. dated February 10, 1910, in favour of the respondents, in an action in which the respondents were plaintiffs and the appellants were defendants, and dismissing the appellants' counter-claim.

The facts of the case, so far as it is necessary to state them, are as follows.

The appellants are a company registered and incorporated under the Limited Liability Laws of the Colony of the Cape of Good Hope, having their head office in Kimberley in the said Colony.

The respondents are a company incorporated by Royal Charter dated October 29, 1889, for the purposes mentioned in the said charter. A deed of settlement was duly executed on February 3, 1891, by the members of the company, and approved in pursuance of the provisions of this charter. A supplemental Royal Charter was granted to the respondents on June 8, 1900, and a supplemental deed of settlement in conformity therewith was duly executed by them.

The said charter provides (by clause 20) that nothing in the charter shall authorize the company to set up or grant any monopoly of trade, provided that the establishment of, or the grant of concessions for, banks, railways, tramways, docks, telegraphs, waterworks, or other similar undertakings, or the establishment of any system of patent or copyright approved by the Secretary of State, shall not be deemed monopolies for such purpose, and (by clause 24, sub-clause 5) the company is specially authorized and empowered to carry on mining and other industries, and to make concessions of mining, forestal, or other rights.

In the argument the appellants were for convenience called De Beers, and the respondents the Chartered Company. The latter company had before the year 1892 acquired from native chiefs or owners, not from the Crown, large tracts of land north and south of the river Zambesi, in Northern and Southern Rhodesia, in South Africa, some of which lands were believed to be diamondiferous. This company was in April, 1892, indebted to De Beers in the sum of 80,500*l.* It required more money to carry on its operations, and had in contemplation the project of issuing first mortgage debentures, to be secured by a trust deed specifically charging all its lands and mineral rights in South Africa, but neither the time nor the amount of the issue had been then fixed upon or determined.

The company in this state of things entered into a contract with De Beers, dated April 20, 1892, whereby it was, amongst other things, provided: (1.) That the latter should, on the execution of the agreement, and also upon the first of each succeeding calendar month of the then current year, advance to the Chartered Company the sum of 3500*l.*, so that the total amount of the latter company's indebtedness to De Beers should, on December 1, 1892, amount to 112,000*l.* (2) That the Chartered Company should repay this sum to De Beers on January 1, 1893, with interest in the meantime at the rate of 6 per cent. on the amount of their original indebtedness (80,500*l.*) from the date of the agreement and on the subsequent advances from the dates when the same should respectively be made. (3.) That in the event of the Chartered Company determining to issue debentures, as contemplated, De Beers should be entitled to require debentures, being part of this issue, to be issued to them, at whatever might be the rate of issue, in satisfaction of this sum of 112,000*l.* and accrued interest thereon; and that, if De Beers should so require, the Chartered Company should grant to them exclusive licence to work all the diamondiferous ground in their territories south of the Zambesi on certain conditions therein specified, De Beers paying the royalties therein mentioned. (4.) That should there be no issue of debentures by the Chartered Company, or there being such

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an issue De Beers should not desire to exercise their option to have any of the same issued to them, but should desire to obtain the exclusive right to work the above-mentioned diamondiferous lands, they should be at liberty to decline to take payment of the sum of 112,000*l.* for a period of five years, that same should be retained by the company, bearing interest at the rate of 6 per cent. per annum, and that at the end of this period of five years, whether or not the payment of the principal sum of 112,000*l.* be then demanded or not, De Beers should be entitled to a grant in perpetuity of the licence above mentioned.

As far as this agreement is concerned, it is clear that the respondents were not bound to issue debentures; that De Beers were not bound to take any of the debentures in satisfaction of their debt; that it was entirely optional with De Beers whether or not they should claim a grant of the above-mentioned licence, at all events, until after the loan had stood out unsatisfied in whole, or in part, for a period of five years; and further that the obtaining of the licence was in no way conditional either upon the issue of debentures by the Chartered Company, or upon the acceptance of them by De Beers in satisfaction in whole or in part of their debt. These latter were plainly two independent transactions. The monthly advances were made by De Beers.

The Chartered Company desired to construct, or to promote the construction of, a railway from Vryburg to Mafeking, and required for that purpose a loan of 100,000*l.* They accordingly entered into an agreement in writing with De Beers, dated December 7, 1892, and described as supplemental to the agreement of April 20, 1892, described as the principal agreement.

Upon the construction of this agreement the most important point in the case turns. The agreement begins by reciting (1.) that De Beers will, before December 31, 1892, have advanced to the Chartered Company 112,000*l.*; (2.) that in connection with the construction of this railway from Vryburg to Mafeking and its general operations the Chartered Company contemplated an issue of first mortgage debentures for 750,000*l.*, to bear interest at the rate of 6 per cent. per annum, and that they had applied to De Beers to accept an issue at par of first mortgage debentures, part of this issue of 750,000*l.*, in payment and satisfaction of the said sum of 112,000*l*., and had also applied to De Beers in view of the construction of the above-mentioned railway to lend to them a further sum of 100,000*l*. to be secured by an issue at par of first mortgage debentures, a further portion of the contemplated issue of the 750,000*l*., to all of which De Beers had agreed.

It then proceeds to provide that the sum of 112,000*l*. should not be repaid as provided by the principal agreement, i.e., on January 1, 1893, but should continue outstanding on loan until the first mortgage debenture issue should be made by the Chartered Company, and should carry interest at 6 per cent. per annum until the date when interest on the first mortgage debentures commenced to run; that upon the said first mortgage debenture issue being made, part of the same to the nominal value of 112,000*l*. should be allotted and issued to De Beers, upon which event, and the payment of all interest on this sum up to the date when the interest on the debentures had commenced to run, De Beers should give a receipt for the said sum of 112,000*l*., and all interest thereon.

It further provided that the first mortgage debentures for 750,000*l*., i.e., the whole issue, and interest thereon at the rate of 6 per cent. per annum were to be secured by a floating charge upon the entire assets and undertaking of the Chartered Company, and a further and better charge on certain lands therein mentioned which the company then were or thereafter might become entitled to, on the completion of the above-mentioned railway, the floating charge, however, to be so framed that the Chartered Company should be at liberty, in the course of its business and operations and for the purpose of carrying on the same, to manage, deal with, work, and turn to account by sale, lease, or otherwise such assets as it might deem expedient, subject to this, that the Chartered Company was not to be at liberty to execute any mortgage or other charge in priority to the first mortgage debentures for 750,000*l*. and the interest thereon.

It further provided that De Beers should advance the sum of 100,000*l*. when required by the Chartered Company in instalments at an average rate not exceeding 10,000*l*. per month as required for the purpose of the aforesaid railway as against the issue of these debentures for 100,000*l*. And paragraph 6 provides that in consideration of the assistance rendered and to be rendered by De Beers to the Chartered Company as appearing in these two agreements the Chartered Company should grant to De Beers exclusive licence to work all diamondiferous grounds to which they were then or might thereafter become entitled, north or south of the Zambesi, subject to the payment of royalties therein mentioned. It is admitted that the sum of 100,000*l.* mentioned in this agreement was advanced as stipulated, the first instalment on July 1, 1893, and the remainder from time to time afterwards. It would appear to me that it could neither be successfully contended that this sixth paragraph did not contain a present unconditional agreement to grant the licence to work the diamondiferous land of the Chartered Company therein specified, irrespective of whether or not debentures were issued as contemplated; nor that from the date of the supplemental agreement the lands of the company on North and South Rhodesia did not become in equity subject to, and burdened with, the rights and interests contracted by that paragraph to be vested in De Beers.

The debenture trust deed was not executed till June 27, 1894. The Chartered Company were, of course, parties to it. It contained, amongst others, a provision to the effect that the charge created by it was a floating security, and accordingly that the company, in the course of its business and operations and for the purpose of carrying on the same, might sell, exchange, convey, appropriate, lease, surrender, manage, deal with, work, turn to account the property charged or any part or parts thereof, and give effect to concessions of mining or other rights in such manner as the company might think fit, save that they should not create any mortgage or charge in priority to the security thereby constituted. A provision (paragraph 13) was introduced that the security thereby constituted should be enforceable in certain events, six in number, named in it. It gave to the trustees a power of sale, with a provision (paragraph 16) that the money, the proceeds of the sale, should in the first instance be applied towards the payment of the arrears of interest due on the debentures, pari passu, and, secondly, to the payment of the principal due on the same, pari passu; and that on such payment being made, a memorandum thereof should be indorsed by the trustees on the debentures.

The form of the debenture is given in the schedule to this deed. In this it is provided that the issue of 250,000*l.* mortgage debentures and 500,000*l.* debenture stock of the company should rank and carry interest, pari passu, on the premises charged, as a floating security. By one of the conditions set out upon it (paragraph 10) power is given to the company to pay off the debenture on giving six months' notice, and by paragraph 11 the principal moneys secured are only made payable on the non-payment of interest or the happening of one of the several events named. Should the interest be regularly paid and none of these events occur, the principal moneys were to remain outstanding, no day being fixed for payment or redemption of them.

The debentures were to the amount of 212,000*l.* issued to De Beers some time after the date of the deed. They were paid off long before this action was instituted. The Chartered Company now contend that the agreement contained in the sixth paragraph of their agreement of December 7, 1892, to grant to De Beers an exclusive licence to work their diamondiferous ground in North and South Rhodesia was a clog on the equity of redemption in the property and undertaking, which remained in them after the issue of these mortgage debentures to De Beers and others, and was therefore void; that on the payment to De Beers of the debentures held by them the property mortgaged was thereby redeemed; and that the Chartered Company were entitled to have it restored to them free from the burden of this licence. Much reliance was placed by counsel for the company in argument on the application to the agreement of December 7, 1892, and especially to its first paragraph, of the well-known doctrine of Courts of Equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, to be done. So that the very first point to be considered in this case, necessarily, is the true construction of the contract of December 7, 1892—the determination of what the parties to it had respectively bound themselves to do.

First it is, in my view, as I have already indicated, clear that paragraph 6 of that contract imposed upon the Chartered Company an immediate and absolute obligation to grant the licence therein mentioned. And, second, I think that paragraphs 1, 2, and 4 of that agreement do not impose upon the Chartered Company an immediate or absolute obligation to issue or allot to De Beers 112,000*l.* mortgage debentures in payment of the debt due to them. Their obligation fell far short of that. It amounted, in my opinion, to this, and this only.

The Chartered Company bound themselves, if and when they issued or allotted these 750,000*l.* mortgage debentures, to issue and allot to De Beers in payment of this debt debentures, portion of 750,000*l.*, of the nominal amount of 112,000*l.* It was, in my view, left optional with the Chartered Company, at, and after, the time they were so absolutely bound to grant the licence, whether or not they would or would not mortgage their property to De Beers in the manner proposed. If that be so, the contract to grant the licence to work the diamondiferous land, and the creation of the mortgage, are not two parts of one and the same transaction, but entirely independent contracts, and the grant of the licence could not, therefore, have formed, and did not form, part of the security pledged for the payment of the mortgage debt. On the contrary, the property charged by the mortgage debentures would be the undertaking, i.e., the assets of the company, burdened and encumbered with the prior obligation, superior to the mortgage security, to grant the licence; so that upon payment of the mortgage debt this licence would remain valid and binding, unaffected by the redemption, because it was not so pledged.

No doubt the consideration mentioned in paragraph 6 for the grant of the licence is "the assistance rendered and to be rendered by De Beers to the Chartered Company as appearing in the principal agreement and that agreement." It was urged in

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argument, as I understood, that these words only covered the past loan of 112,000*l.*, the future loan of 100,000*l.*, and the obligation to leave the first outstanding for the stipulated time, but even if they covered in addition the contract of De Beers to take mortgage debentures when issued in payment of their past debt, the omission or refusal of the Chartered Company to issue the debentures, even if they were bound to issue them, would not invalidate the contract to grant the licence, since the failure of the consideration would then only be partial.

The stipulation contained in the first paragraph of the December agreement that the loan of 112,000*l.* should continue outstanding until the first mortgage debenture issue was made was relied upon to shew that the Chartered Company were bound to issue these debentures, else the loan might never be paid, a result which it could not be supposed the parties ever intended. It by no means necessarily follows, however, that such a result would be brought about, even if the issue of the debentures was optional and the Chartered Company omitted to issue them.

The contract must, I think, be held to mean that the loan should remain outstanding until the issue was in fact made, or until a reasonable time had elapsed for the making of it. If the Chartered Company refused before the lapse of that time to make the issue, or omitted after its lapse to make it, then, in either of these events, De Beers would be free to call in the loan. I do not know if the first point was developed as fully, or pressed as strongly, in argument before the Court of Appeal as it was before your Lordships. It appears to me, however, to be a good point, fatal to the respondents' contention in reference to the debentures for the sum of 112,000*l.*, because, as I have said, in my view the obligation of the Chartered Company was as to grant of the licence present and absolute, and as to the issue of the debentures optional, and that the contracts of the parties in reference to these two matters were not different parts of one transaction, but separate agreements, each independent of the other, the former contract, therefore, forming no part of the consideration given for the mortgage.

There was much discussion on the origin and history of this equitable doctrine of the clogging of an equity of redemption,

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the oppressive circumstances out of which it originally arose, the evils it was designed to remedy, and its inapplicability to such a security as is created by the mortgage debentures out of a commercial company. Several authorities were cited to shew what were the precise nature and incidents of the floating charge created by such instruments, including the cases *Governments Stock Investment Co.* v. *Manila Ry. Co.* (1), *Illingworth* v. *Houldsworth* (2), *Evans* v. *Rival Granite Quarries, Ld.* (3), and special attention was directed to the description given by Lord Macnaghten of this floating charge at p. 86 of the first mentioned report, and by Buckley L.J. at p. 999 of the last mentioned.

Lord Macnaghten said: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern, or until the person in whose favour the charge is created intervenes." And Buckley L.J. says: "A floating security is not a future security; it is a present security which presently affects the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

In the present case the charge never so crystallized, and it would appear to me that such statements of the law as these, that "on repayment of all that is properly payable on the security of the property charged, the whole of that property must be restored to the borrower unfettered and undiminished by anything created in favour of the lender, as part of the consideration for the loan"; that "the corollary applies to all cases where there is a right to redeem, and is incident to or part of that right"; that "the sole question is, is there a right to redeem," however applicable to ordinary mortgages of land or chattels, are scarcely applicable to a case where the mortgagee never had possession, actual or constructive, of any of the property, never had any estate in it vested in him, or any specific charge upon it created in his favour. In the view I take of the meaning of the agreement it is not necessary to decide this point. The case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (1) certainly does not rule it, for in that case, as appears from the report in [1902] 2 Ch. at p. 481, mortgage debentures were not issued by the borrowing company to the lender. On the contrary a certificate of 30,000*l.* first mortgage redeemable debenture stock was handed over to the mortgagee in exchange for 5000*l.* and the stock was subsequently transferred to the lender, a specific charge being thus created in the latter's favour on this particular stock. The alleged clog in that case was a stipulation that the lender should have an option to purchase the whole or any part of the stock at any time within twelve months at 40 per cent. This was the very kind of device to acquire the mortgaged property absolutely, against which the Courts of Equity set their face.

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(1) [1897] A. C. 81.
(2) [1904] A. C. 355.
(3) [1910] 2 K. B. 979.

I fully concur, however, with the observations of Lord Macnaghten, who, after dealing fully with the origin and history of this doctrine as disclosed in the authorities, is reported at p. 327 of the report in the House of Lords to have spoken as follows: "Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from an impecunious landowner in the toils of a crafty money-lender." No case was cited directly ruling the point. The *Jarrah Case* (1) is the nearest authority, but if one were free to deal with the matter on principle and apart from authority, I should, speaking for myself, incline to the opinion that the facts (1.) that no specific charge is, in the first instance, created by these mortgage debentures; (2.) that the mortgagor is free to deal, in the ordinary course of business, with the assets subject to the floating charge; (3.) that the debenture-holder has no right similar to the right of foreclosure possessed by an ordinary mortgagee, and can never recover more in money than the amount of his debenture, render the doctrine of clog inapplicable to such transactions; but, of course, I preserve an open mind upon the subject.

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(1) [1904] A. C. 323.

The only other point argued was raised upon the 20th clause of the charter, to the effect that the grant of the exclusive right to dig and work the diamondiferous lands of the company over so vast an area as that of Northern and Southern Rhodesia was a monopoly prohibited by the following express words of the clause: "Nothing in this, our charter, shall be deemed to authorise the company to set up or grant any monopoly of trade," and was, therefore, ultra vires and void.

It is perfectly clear that the grant or licence by a proprietor of land to some person to use and exercise exclusively over that land some of his own proprietary rights is not a monopoly of trade within the meaning of such a clause as this. I accordingly am of opinion that the judgment appealed against was erroneous and should be reversed, and this appeal be allowed with costs.

EARL OF HALSBURY. My Lords, I had intended to distinguish, so far as I could, the ordinary case of a mortgage from that to which from time to time it has been likened, though I think only by analogy,—the case of floating securities, debentures, and so on, which are well known commercial documents, and which play a most important part in the commerce of this country.

My Lords, the extremely lucid, and to my mind convincing, argument that has just been delivered by my noble and learned friend Lord Atkinson renders it unnecessary for me to go through the narrative that he has put before your Lordships. I entirely and heartily agree with the conclusions at which he has arrived. I only wish to say—and this is the only reason why I interpose at all—that it must not be supposed that the effect of this decision or of anything that we are saying is in any way to affirm the proposition that debentures or floating securities of the nature of debentures are necessarily affected by this equitable doctrine which, I agree, is now part of the jurisprudence of this country. That does not necessarily involve that everything that has been by analogy called a mortgage is within the ambit of that doctrine. Against that I should utterly protest; and there is no part of the judgment which my noble and learned friend has just delivered with which I more heartily agree than that wherein he has pointed out that which is, to my mind, a sufficient distinction between an ordinary mortgage and a floating charge. But the effect of what he has done in disentangling the somewhat entangled arrangements that were made here is that, if we were to attempt to deal with that doctrine, and to shew the limitations within which that doctrine forms part of the law of England, I am afraid it might be said, and said with justice, that any such expression of opinion was obiter because it did not arise in the case. Of course it would be undesirable for us to give judgment on a matter which is practically not before us; and therefore I only say that I entirely and heartily concur in my noble and learned friend's judgment.

EARL LOREBURN L.C. My Lords, I have had the advantage of reading the opinion of Lord Atkinson, which fully deals with the facts of this case and relieves me from that task. Accordingly I will state the reasons which constrain me to differ from the order of the Court of Appeal as briefly as I can; for the difference relates only to one point.

What the plaintiffs, a chartered company, ask in this action is that two agreements made between them and the De Beers' Company, the defendants, shall be declared ultra vires and void in so far as they purport to confer upon De Beers an exclusive licence to work diamondiferous ground in the company's territory. The point really turns upon the effect of the agreement dated December 7, 1892.

There is nothing in the contention that these agreements created a monopoly contrary to the charter, and none of the learned judges has adopted it. But the Court of Appeal, affirming Swinfen Eady J., have decided that the provision for a diamond mining licence is invalid because it amounts to a clog on the equity of redemption.

Now your Lordships are unquestionably bound by this rule of equity, and I have no intention of evading it, but I must point out, that if it is to govern this case, then one party to an honest and, in morals as well as business, perfectly unimpeachable contract, is enabled to get rid of its obligation. That would be a deplorable consequence to flow from an equitable rule.

I cannot help thinking that there is some danger lest this doctrine may be stretched beyond the necessities which gave rise to it and become an aid instead of a hindrance to unjust dealing. But I am glad to arrive at the conclusion that the present case does not fall within it at all, and for the following reason. When a mortgage is paid off the property secured is as free and the owner must be as free to dispose of it as if there had never been a mortgage at all, and any device to prevent full redemption when the sum due is paid off will be void. Now it appears to me (I say it with all respect) that when the mortgage or charge in the present case came into being, either in law or in equity, the diamondiferous land which was included in the mortgage was already subject to this licence, and so the right to work the diamondiferous land never was included in the mortgage or charge.

The agreement of December 7 in effect, so far as material, provided as follows: The Chartered Company granted to De Beers an exclusive licence to work all their diamondiferous land at once and unconditionally. On the other hand De Beers were to leave their past advances to the Chartered Company still on loan, to add to those advances, and in discharge of all their advances to accept debentures if and when the Chartered Company should issue them. The Chartered Company, even if bound to issue debentures, certainly were not bound to issue them at once, and, if issued, the debentures were to be then secured by a floating charge upon the entire assets and undertaking of the Chartered Company including, of course, the diamondiferous lands. Meanwhile the company were free to sell or lease or charge their property. It was a general agreement providing for quite a variety of things with which we are not concerned.

In this state of things it seems to me that nothing was included, or intended to be included, in the floating charge, except the assets and undertaking which should belong to the Chartered Company whensoever the debentures might be issued and the security created. If there were at that date any incumbrance upon, or any contract already affecting, such assets or undertaking, then the floating charge would be subject to such incumbrance or contract. In this case there was such a contract granting a licence to work the diamondiferous land, and when, two years or so after the licence was granted, the debentures were issued and the floating charge created, it was created subject to the licence. Paying off the debentures released the whole of the property charged. It did not indeed release the Chartered Company from the burden of this licence, for the excellent reason that the charge was subject to the licence. The licence was not a clog on the equity of redemption, because when the redemption took place everything which had been charged was restored to the mortgagor.

I think, therefore, that this appeal should be allowed and judgment entered for the defendants.

I wish to add that I agree with what Lord Atkinson and Lord Halsbury have said as to the point whether the doctrine under discussion applies to floating charges.

Lord Gorell. My Lords, I concur. I will only add that the Court of Appeal based their decision upon the equitable doctrine of the clogging of an equity of redemption, but, for reasons given by the noble Lords who have preceded me, it is unnecessary to express a final opinion on this point. I may say, however, that I question the applicability of this doctrine to the case of floating debentures when the mortgagor is left able to deal with the assets included in the charge and there is no specific charge created in the first instance, but the charge crystallizes on a subsequent event, and the debenture-

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

holders cannot recover more than the amounts payable under the debentures.

Order of the Court of Appeal reversed and action dismissed: By consent, without prejudice to future proceedings by the appellants to enforce the agreement in question, no order on counter-claim: The respondents to pay the costs in the Courts below and of the appeal to this House: Cause to be remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, December 4, 1911.

Solicitors for appellants: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1911
Nov. 13.

DANIEL MORGAN . . . . APPELLANT;

AND

WILLIAM DIXON, LIMITED . . . . RESPONDENTS.

Employer and Workman—Workman requiring Presence of his own Medical Attendant at Examination—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clause* 4.

A workman who had given notice of an accident within the meaning of the Workmen's Compensation Act, 1906, refused to submit himself for medical examination by a medical practitioner provided by his employers except upon the condition that his own medical attendant should be present throughout the examination. There were no special circumstances which required the presence of the medical attendant:—

Held, affirming the decision of the Court of Session, 1911 S. C. 403 (Lord Shaw of Dunfermline dissenting), that in the absence of special circumstances the workman was not entitled as of right to have his medical attendant present at the examination.

Held, secondly, that whether a request for the presence of the medical attendant was under the circumstances reasonable is a question of fact to be determined by the arbitrator under the Act.

Per Lord Shaw of Dunfermline, dissenting, that the workman had a right in all ordinary circumstances to require that his medical attendant should be present at the examination, and that the burden was on the employers to shew that this requirement was under the special circumstances so unreasonable as to deprive the workman of the right.

H. L. (Sc.)
1911
MORGAN
v.
WILLIAM DIXON, LIMITED.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland (1), in the form of a special case.

The following case was stated by the sheriff-substitute (A. S. D. Thomson):—"This is an arbitration in which the appellant" (Daniel Morgan, a driver) "claimed an award of compensation under the said Act in respect of an injury to his left foot which injury is alleged to have been sustained while he was in the employment of the defenders" (the respondents Messrs. William Dixon, Limited, Blantyre Colliery, Blantyre) "as an underground driver on June 3, 1910. After the petition for an award of compensation had been presented, the respondents required the appellant to submit himself for examination by a duly qualified medical practitioner provided and paid by them, under s. 4 of the First Schedule of said Act. (2) The appellant however refused to submit himself for such examination unless upon condition that his own medical attendant should be present throughout the examination. The respondents refused to accede to this condition and contended that the appellant's refusal to submit himself to medical examination unless on the condition above referred to amounted to obstruction in terms of the said section. They lodged a minute in the arbitration craving the Court to sist the appellant's application for arbitration until he submitted himself for medical examination in terms of the said section. Parties were heard upon this minute and it was conceded in argument by the appellant that there were no special circumstances in his case which called for the presence of his medical attendant at the examination, his contention being that it is the right of the workman in every case without alleging any special reason to have his medical attendant present at the examination and to refuse to submit himself for examination unless and until his employers consented thereto. The arbitrator while willing to consider any special grounds which might make it expedient that the appellant's medical attendant should be present held that the appellant's contention was not well founded and he accordingly granted the crave of said minute and sisted the application for arbitration until the appellant submitted himself for medical examination as required by the respondents."

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(1) 1911 S. C. 403.

(2) Clause 4 of the First Schedule of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), provides: "Where a workman has given notice of an accident he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place."

"The question of law for the opinion of the Court is"

"Whether apart from any special circumstances in a particular case a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employers in terms of s. 4 of the First Schedule of the Workmen's Compensation Act, 1906, and whether the workman's refusal to submit himself for examination unless his doctor is allowed to be present amounts to 'refusal' or 'obstruction' in terms of said section." Dated November 15, 1910.

On December 24, 1910, the Second Division pronounced the following interlocutor:—". . . . answer the first branch of the question of law therein stated in the negative, and the second branch thereof by finding that the workman's refusal to submit himself for examination unless his doctor was allowed to be present amounted, in the circumstances of the stated case, to refusal in terms of s. 4 of the First Schedule of the Workmen's Compensation Act, 1906. Therefore refuse the appeal."

1911. Nov. 13. *Alexander Ure, L.A.* (with him *J. C. Fenton*) (both of the Scottish Bar), for the appellant. *Devitt* v. *Owners of the S.S. Bainbridge* (1) governs this case. That was a case under Sched. I., clause 14, but the words were similar to the words of clause 4. There a medical man instructed by the employers asked a workman in receipt of

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(1) [1909] 2 K. B. 802.

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weekly payments under the Workmen's Compensation Act to submit himself to examination. The man answered that he had no objection provided his own medical man was present. It was held that he could not be taken to have refused to submit himself to examination within the meaning of the Act. The Lord Justice Clerk appears to have been under the impression that there were special circumstances in that case. There were no special circumstances. There Cozens-Hardy M.R. said: "The workman said he had no objection to being examined provided that his own medical man was allowed to be present at the examination. Is it possible for us to say that by doing so he 'refuses to submit himself to such an examination'? It was, on the contrary, an expression of the workman's willingness to submit to the examination, only adding a stipulation which the county court judge had full power to decide was a reasonable one, and he thought it was reasonable." *Osborn* v. *Vickers, Sons & Maxim* (1), relied upon by the judges in the Court of Session, was a case under the Act of 1897, in which Sched. I., clause 3, corresponded with Sched. I., clause 4, of the Act of 1906. There was no doubt that the subsidiary question in that case was whether a workman was entitled apart from special circumstances to impose upon his employers the obligation of paying for the attendance of the workman's medical attendant at such an examination, and the Court of Appeal held that the expenses of another medical man were not to be imposed upon the employers. The claimant in the present case does not ask that the expenses of his medical attendant shall be thrown on his employers. The arbitrator's decision that the application amounted to a refusal to submit to examination was not upon a question of fact, but was a finding in law.

Scott Dickson, D.F., and *Harold W. Beveridge* (the former of the Scottish Bar), for the respondents. The argument of the appellant can only be supported by adding to clause 4 of Sched. I. a provision that a workman who submits himself for examination is entitled to have his medical attendant present at the examination. To allow the attendance of the two medical men is

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(1) [1900] 2 Q. B. 91.

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calculated to increase the expense of the arbitration. The difference between this case and *Devitt* v. *Owners of the S.S.Bainbridge* (1) is the fact that in this case it was conceded by the appellant that there were no special circumstances. If it had been the intention of the Legislature that the workman should be entitled to have his medical attendant present at the examination, it would have added words to ss. 4, 14, and 15 conferring the right. In *Powell* v. *Main Colliery Co.* (2) the Earl of Halsbury L.C. said: "Now it certainly is a very familiar rule of construction that you have no right to add words to a statute unless the exigency of the rest of the statute which you are construing renders it necessary." And in *Osborn* v. *Vickers, Sons & Maxim* (3)—a case on the same words as are here in question—Collins L.J. said: "I do not say that there might not be special circumstances in a case rendering it so essential to the wellbeing of the person to be examined to have some medical man conversant with his constitution or state of health present at the examination that it might be considered a necessary part of the examination that such a person should be present. Possibly such a case may arise. But in the present case there are no such special circumstances, and in my opinion in imposing the condition that he did the county court judge acted ultra vires." It should not be forgotten that if the workman has the absolute right which he claims the fee payable to his doctor may be held to be included in the words "costs of and incidental to the arbitration and proceedings connected therewith": Statutory Rules and Orders, s. 61 (5.), June 1, 1907; Statutory Rules and Orders of 1907, p. 567; and Sched. II., clause 7, of the Workmen's Compensation Act, 1906; and if this were the case it would be within the discretion of the arbitrator to award it to the workman.

Alexander Ure, L.A., replied.

EARL LOREBURN L.C. The question which is raised in this case is stated by the arbitrator in a way which may be a little embarrassing, but we must deal with it as it is stated. The fourth clause of the First Schedule of the Workmen's Compensation

(1) [1909] 2 K. B. 802.
(2) [1900] A. C. 366, 371.
(3) [1900] 2 Q. B. 91, 94.

Act confers upon the employer a right to have a workman who has given notice of an accident examined medically, and there is a duty on the part of the workman to submit himself to be examined; but the statute is silent, and the rules are partially and I may say mainly silent, as to the time, the place, and the conditions of this examination. Under those circumstances practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute.

Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case is a question of fact in that particular case. If I were an arbitrator I should say as a question of fact that in most cases—perhaps in nearly every case—it is quite reasonable on the part of a workman to desire the presence of his own doctor. That may be sometimes unreasonable because of inconvenience or expense or for other reasons which can be established, and which one cannot forecast. I should have been disposed to say if there were no special circumstances, if there were no proof of inconvenience or expense, why should not the doctor of the workman be present? I see no harm that he can do; and I can conceive that he might be very useful. But, my Lords, it is not the function of a Court of law, or of this House as a Court of law, to take upon itself the decision of questions of fact which by the statute are left to the arbitrator or to the sheriff or county court judge as the case may be. It is a matter for the arbitrator to decide, who has been entrusted with the duty by law, and not for me to decide, who have not been entrusted with the duty of finding facts. Now, my Lords, that being so, what are the questions of law which we are asked to determine? The first is whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employer. This question was raised by the appellant's own argument; it was the only contention which he did put forward before the arbitrator; it has been put as a question of law to your Lordships. In my opinion the proper answer is that we cannot say as a matter of law that the workman is so entitled—there is no absolute right of the kind claimed. It is a question for the sheriff or the arbitrator in each case to determine whether the condition imposed by the workman is a reasonable or an unreasonable condition.

The second question seems to me practically to amount to the same as the first, and to be dependent on the appellant's contention before the sheriff. It really is the same question, and it also is a matter of fact which must be decided in each case, the principle of law being that both sides should act reasonably. In short, my Lords, if these are to be treated as questions of law, I cannot answer in the affirmative either the one or the other of them. I cannot answer the first in the affirmative, and the second question seems to me to be the same as the first. Accordingly I am of opinion that the appeal must be dismissed. I desire to observe that the question raised and decided by the sheriff was not whether the condition was reasonable (which, I think, was the right question), but whether there existed a right in law, in the absence of special circumstances, as was contended by the workman before the arbitrator.

LORD ATKINSON. My Lords, I concur. I think the parties came here to establish an absolute legal right in every workman to require that the medical examination by his employer's medical man should take place in the presence of his own medical man. I concur with my noble and learned friend on the woolsack that the law gives him no such abstract right, and that, therefore, that being the point raised, the appeal should be dismissed.

In my view the question whether there is a refusal or not under the Act to submit to examination is a question of fact, and any reasonable requirement that may be put forward by the workman, such as, for instance, having his own medical man present, ought not and would not by any reasonable arbitrator be held to amount to a refusal to submit to examination. I further think that it cannot be held that the request to have the workman's medical man present upon all occasions can be considered as prima facie reasonable. On the contrary I think, having regard to the wording of the statute, the burden of proving that the request is reasonable is thrown not upon the employer, but upon the workman who makes it. I concur with my noble and learned friend in thinking that in many cases,—indeed it would appear to me in most cases,—in the absence of any inconvenience or difficulty in getting the attendance of the person required, it is a most reasonable thing that the medical attendant of the workman should be present at the examination. I concur therefore that, your Lordships having no jurisdiction to decide issues of fact, and the appeal having been brought forward to establish this abstract legal right, it should be dismissed.

Lord Gorell. My Lords, I concur in the result of the judgments which have been pronounced.

I think that the question that was really contested in this case is made plain by reading one paragraph from the stated case, and that is this: "Parties were heard upon this minute and it was conceded in argument by the appellant that there were no special circumstances in his case which called for the presence of his medical attendant at the examination—his contention" (and this is the real point of the matter) "being that it is the right of the workman in every case without alleging any special reason to have his medical attendant present at the examination and to refuse to submit himself for examination unless and until his employers consented thereto."

I think that that paragraph states what was the real contest between the parties, which is expressed in a somewhat different way when you come to the statement of what is the question, at the end of the case, the question being stated as a question of law for the opinion of the Court. I think that what was really raised by that statement and contention was the right of the workman, independently entirely of the question whether it was reasonable or unreasonable (which it may have been), to have his medical man present at every examination in every case as it is here stated. That is a proposition which cannot, in my opinion, be maintained as matter of law, and I concur with what has fallen from the noble and learned Lords who have preceded me. It leaves out of consideration altogether what in these cases is practically a question of fact, whether it is reasonable or not for the workman to have his medical attendant present at the examination made on behalf of the employer. This contention is stated as amounting to a right wholly independent of whether there is any reason or not for another doctor being present—that is to say that the workman shall have the right to have his own doctor present. I agree with what has fallen from my noble and learned friend Lord Atkinson. I think the burden is on the workman to shew that there is some reason for the attendance of a further medical man, because, as I ventured to suggest in the course of the argument, prima facie under the statute the employer has the right to have the examination in order to see what his position is; the workman, on the other hand, has to submit to it, and if he raises any objection by reason of his desire to have another medical man present, he raises a condition on his part, and I think it is for him to give the reason for raising such a condition.

For these reasons I concur in the view that this appeal should be dismissed.

LORD SHAW OF DUNFERMLINE. Differing as I do so radically from your Lordships I should naturally have desired time for further consideration as to the form of my judgment. But in the circumstances my mind is so clear as to my own course that I cannot but hold it to be my duty to dissent, although I do so with diffidence. I am glad, my Lords, to be supported in the view which I entertain by the unanimous decision of the Court of Appeal, consisting of the Master of the Rolls and Farwell and Kennedy L.JJ., in the case of *Devitt.* (1) Your Lordships have not referred to that decision, but in the Court below (2) the learned Lord Justice Clerk referred to it thus: "There may have been many circumstances in that case as to which no inquiry or investigation was made but which might have made the suggestion of the workman a perfectly reasonable and proper suggestion. It might have been most dangerous to the man himself to proceed without the practitioner being present who knew him and knew the state of his health and constitution, and who, if anything was being done

(1) [1909] 2 K. B. 802.

(2) 1911 S. C. 403, at p. 405.

in the course of the examination, could suggest that something ought to be done or something ought not to be done, as the case might be. That is not the kind of case we have here." My Lords, we were assured by the learned Lord Advocate, who had perused the papers in the case, and it was not denied, that this was a misapprehension on the part of the learned judge, that there were no such special circumstances in *Devitt's Case* (1), and that the case there presented stood entirely as the present case stands. And there can be little doubt accordingly that the helpfulness and value of the case of *Devitt* (1) were to some extent mitigated by his misapprehension. In my opinion the case of *Devitt* (1) was rightly decided, and I desire to express my concurrence with the judgment of the learned Master of the Rolls.

I have not heard from any one of your Lordships anything in the nature of an abstract consideration which would make the proponing of this condition unreasonable on the part of the workman. When sub-s. 4 of Sched. I. of the Act of 1906 was enacted it provided that "Where a workman has given notice of an accident he shall if so required by the employer submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit to such examination or in any way obstructs the same his right to compensation shall be suspended." What has happened in this case is that the workman, being so requested by the employer to submit to an examination, has consented to that examination subject to his own medical man being present. Anything less unreasonable to my mind than the proposition that that is an out and out refusal does not occur to me at present, nor does it occur to me how that can be characterized as an obstruction. I do not find it in any way inconsistent with the statute that unless a refusal or obstruction shall be established the workman's reasonable rights should be respected equally with those of the employer. In this case it is said that the adjecting of this condition amounted to a refusal unless the workman was able to allege a reason in advance for having his desire gratified that his own doctor should be with him while his master's doctor was examining him. In the course of the argument I put the ordinary case: How can an injured workman allege such a reason in advance? He may have sustained injuries—in many cases he does sustain injuries which produce not only direct but indirect effects, the latter especially being obscure.

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(1) [1909] 2 K. B. 802.

It is of the utmost advantage to both parties that medical men representing adverse sides in what might turn out to be a contention should at the same place, at the same time, and under the same circumstances be parties to the one examination. It is, however, now, I presume, declared by law that, unless it is so found in advance as matter of fact that that is a reasonable thing, this House is to be debarred from saying that in point of law that is the workman's right. I put the proposition in point of law thus: that the right of the employer on the one hand to compel the submission of a workman to a medical examination has its correlative in the right of the workman to be protected and to have his interests seen to while that examination is conducted. I agree with my noble and learned friend on the woolsack that there is a right on the one side and an obligation on the other, et e converso, and I further agree that it is the duty of both parties to have these rights and obligations reasonably respected and performed. But under those circumstances what has been asked by the workman here? He has been asked to submit to an examination, and on the contrary side he says "I shall do so, but observe please my right, which is that my doctor shall be there." I submit the view to your Lordships, which, I regret, has not been accepted, that in so proponing the workman's right the workman has done that which put the legal situation thus—that it was for the employer, denying the right upon the side of the workman, to establish that his denial was a reasonable one. My Lords, as I construe the case, and speaking for myself, it is not the fact that an abstract right of an absolute and universal character is sought to be established. What is sought to be established here is laid down in the proposition by the learned sheriff. It is to this effect: "whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present." I have no hesitation, for my part, in saying that that proposition ought to be answered in the affirmative. I think it is the right of a workman, who has to submit his person for examination, to have his doctor present, apart from any special circumstances in a particular case which would negate and nullify such a right. In those circumstances, I should have no hesitation in deciding the case in a contrary sense to that which has been proposed from the woolsack.

Now, my Lords, what are the facts of this case? There are none; there are no special facts found by the learned sheriff at all. He has decided solely in the abstract that, special circumstances being absent, this right does not exist, or rather he has decided that apart from special circumstances the workman has no such right. As I say, my Lords, there is no fact here to specialize this case at all and make the workman stand deprived of the right correlative to the examination to which I have referred. I bear in mind further, my Lords, that in the ordinary case, which is the case we are dealing with here,—a case admitted to be apart from specialty,—no conceivable harm can be done either to the workman or to the medical adviser of the employer by having a second doctor on the spot. There is to be no charge to the employer, for it is to be done at the workman's own cost: and for my own part my recollection bears me out in saying that my experience of that great profession would be that 95 per cent. of doctors would prefer another doctor being present so far as their own satisfaction and the ease of the situation and the settlement of the truth were concerned. But in the present case there is a special use attached to the presence of another medical man. Sect. 4 of the schedule is not a section applicable to proceedings in foro. It is a section applicable to this situation where only notice of accident has been given, and where it must be the desire of both parties that an amicable and reasonable arrangement be come to. How desirable it is in those circumstances that this situation should be eased in the particular matter, that both doctors should agree as to what is wrong and what would be a suitable remedy. All the demand the workman has made here is that that agreement should be facilitated by the presence of his medical man. I cannot think that in its nature to be unreasonable. There are no facts proved or proceeded upon in this case to make it

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unreasonable or to suggest that it was unreasonable, and unless it is found in fact to be unreasonable owing to special circumstances, I do not think this House should be debarred from holding that the workman had that right.

My Lords, as I have observed, I do not think the decision come to in the Courts below was a decision in fact. I do not think the sheriff had addressed himself to it as a question of fact. He has treated the question as one of absolute right (conditioned in the sense I have explained), a right which he concludes not from fact, but from a construction of the Act of Parliament. In my view that is a matter of law. My whole view may be summed up in this proposition, that in the general case, in my humble opinion, it cannot be reckoned as a refusal if a workman makes an examination by his own medical man a condition of his willingness to submit to examination by the medical adviser of his employer. I cannot agree that the fact of the adjection of such a condition is ipso jure a refusal or obstruction. I hold it is nothing else than a reasonable thing, not displaced from its reasonableness by any fact proved. Accordingly, my Lords, I respectfully dissent from the judgment proposed.

EARL LOREBURN L.C. According to my own opinion it is a question of fact whether or not the presence or absence of the workman's doctor is reasonable in the particular case, and your Lordships are not judges of fact. That is all I intended to convey.

Appeal dismissed with costs.

Lords' Journals, November 13, 1911.

Agents for appellant: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Solicitor, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

HUGH SYMINGTON . . . . APPELLANT;

AND

THE CALEDONIAN RAILWAY COMPANY . RESPONDENTS.

H. L. (Sc.)
1911
Nov. 16.

Railway—Minerals—"Freestone"—Relevancy—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict. c.* 33), *ss.* 70, 71.

Whether a particular substance is or is not a "mineral" within the meaning and for the purpose of ss. 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, is a question of fact to be determined by the evidence; and an averment that certain freestone rock underneath land acquired by a railway company did not form the substratum of the soil, but on the contrary was a substance of exceptional character and recognized in the mining and commercial world and by all railway companies and by all proprietors in or through whose lands railway companies had occasion to construct lines and relative works to be a mineral within the meaning of the Act, is sufficient to warrant the allowance of a proof.

So *held*, reversing the decision of the Second Division of the Court of Session, 1911 S. C. 552.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

In 1846 the respondents acquired for purposes of their railway certain portions of the estate of Woodhouse, in the parish of Kirkpatrick-Fleming, Dumfriesshire, and a conveyance in their favour was executed in 1852.

The appellant was assignee of a lease granted by the proprietor of Woodhouse in 1896, and subsequently extended. Under the said lease the appellant had "the sole and exclusive right of quarrying for and removing freestone rock upon the estate of Woodhouse" within stated limits, which purported to include the freestone under the respondents' railway.

By notices dated July 17 and 30, 1907, and January 30, 1908, the appellant gave notice to the respondents in terms of s. 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, of his intention to commence working certain areas of freestone rock lying under the respondents' railway, and by notices dated

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(1) 1911 S. C. 552.

December 12, 1907, and April 17, 1908, the respondents gave the appellant notice that they desired to be left unworked two areas of freestone, extending to 1272 square yards, under their railway. In January, 1908, a question arose between the parties as to the position of a crane which the respondents objected to on the ground that it overhung the railway; and by letter dated January 29, 1908, the respondents undertook, in view of the crane being removed, that in any statutory proceedings with reference to compensation the removal of the crane should be deemed to be loss or damage occasioned by the non-working of the reserved rock. Thereafter the appellant served a notice of claim, dated May 18, 1909, upon the respondents. Proceeding upon the notice above mentioned and on the recital that, in consequence of the reservation of the rock under 1272 square yards, the rock under a further area of 536 square yards had been rendered unworkable, and on the recital that certain other areas containing respectively 4640 square yards and 5517 square yards were injuriously affected, he gave notice, first, that he desired to have such compensation settled by arbitration, unless the respondents agreed to pay the amount of compensation claimed by him, and second, that his interest in the said freestone rock was as lessee thereof, and third, that the amount of compensation claimed by him was 177,486*l.* 6*s.* 9*d.* Thereafter the appellant nominated an arbiter and called on the respondents to do the same. They appointed under protest an arbiter, and following thereon an oversman was appointed. In January, 1910, the appellant intimated his intention of proceeding with the arbitration. Thereafter, on February 17, 1910, the respondents raised this action to prevent the arbitration being proceeded with and to have the appellant interdicted from encroaching on the respondents' property.

The respondents averred (stat. 11): "The freestone rock within or under the respondents' property was included in the conveyance by which the respondents acquired their property and is not within the subjects reserved therefrom under and in terms of the Railways Clauses Consolidation (Scotland) Act, 1845."

The appellant answered (11.): "The said freestone rock does

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not form the substratum of the soil and is not the common rock of the district in which the appellant's quarry is situated. On the contrary it is a fine red sandstone of exceptional character both in point of evenness of grain and composition. Besides being adapted for the finest kind of building work it is specially suitable for use in the form of grindstones and for many other commercial purposes for which ordinary or common sandstone is unsuitable. It is thus of great commercial value. Explained further, that in selling and purchasing respectively the land in question both the sellers and the respondents treated with each other in respect of the said freestone rock on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act. The respondents desired to and did purchase only such freestone as was necessary to be dug or carried away or used in the construction of the railway works. They did not purchase, and they paid no compensation for, any portion of the freestone rock now in question. Such rock as that here in question was at that time universally recognized and admitted in the mining and commercial world and by all railway companies and by all proprietors in or through whose lands railway companies had occasion to construct railway lines and relative works to be a mineral within the meaning and for the purpose of the statute. . . . . The respondents have treated and admitted the said freestone rock here in question as a mineral within the meaning and for the purposes of the said Act continuously from the time when they purchased and took the land for the railway down to the time when they gave the appellant the notices dated December 12, 1907 and April 17, 1908 . . . . and in and by said notices they not only treated the said freestone rock as a mineral, but contracted and agreed to pay compensation therefor as the same might be settled in terms of the said Railways Clauses Act and relative Acts of Parliament."

The respondents pleaded (5.) : "The defences are irrelevant and should be repelled."

The appellant pleaded (2.) : The respondents "not being the owners of the freestone rock under their property the note should be refused." There were further pleas to the effect

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that certain notices given to him by the respondents requiring him not to work the freestone under the railway constituted a contract to pay compensation which bound the respondents, and that they were not entitled to interdict as asked for, and (6.) he pleaded: "The freestone rock in question being in fact a mineral within the meaning of the said Act the appellant is entitled to compensation in respect of the non-working of the portions of freestone rock reserved by the respondents as the same may be ascertained by arbitration in terms of the Railways and Lands Clauses Acts."

On December 6, 1910, the Lord Ordinary (Lord Cullen) without giving any opinion allowed a proof before answer and appointed the appellant to lead in the proof.

On February 10, 1911, the Second Division, consisting of the Lord Justice Clerk and Lords Ardwall and Skerrington, recalled the Lord Ordinary's interlocutor, holding that the averments of the appellant were irrelevant and that the respondents were entitled to an interdict. (1)

1911. Nov. 14 and 16. *Sir Robert B. Finlay, K.C.*, and *William Hunter, S.-G. for Scotland* (with them *Thomas Gentles*) (the two latter of the Scottish Bar), for the appellant. The appellant ought to be allowed to adduce a proof of the quality of stone in question. The Second Division were wrong in deciding that sandstone or freestone could in no circumstances be a "mineral" and that therefore a proof would be irrelevant. In *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2) Lord Gorell commented on the fact that no evidence had been led to shew that mines of minerals were understood as including ordinary freestone, and Lord Loreburn L.C. said (3)—quoting Lord Halsbury L.C.—that exceptional substances were referred to by the words "or other minerals" in s. 70 of the Act, and that the Court had to determine what these words meant in the vernacular of the mining world, the commercial world, and landowners at the time when the purchase of the land in question was effected.

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(1) 1911 S. C. 252.
(2) [1910] A. C. 116, at p. 134.
(3) Ibid. at p. 127.

Following the above case, the House decided that "china" clay was a mineral: *Great Western Ry. Co.* v. *Carpalla United China Clay Co.* (1) It is now settled that in every case it is a question of fact whether the substance in question is or is not a mineral: see Lord President Dunedin in *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (2) and Lord Loreburn L.C. and Lord Gorell in the *Budhill Case.* (3) What is freestone is not a matter of law. The appellant offered to prove that the freestone here was a substance of exceptional quality and was not the common rock of the district. Moreover the respondents having sent out notices are precluded from denying the right of the appellant to the freestone. The notices sent are equivalent to a contract that the substance here in question was not included in the conveyance to the railway company.

J. A. Clyde, K.C., and *T. B. Morison, K.C.* (with them *Hon. Wm. Watson*) (all of the Scottish Bar), for the respondents. The appellant did not succeed in convincing the Court below that his averments were sufficient. He can only be entitled to a proof if his averments are sufficient to indicate the facts upon which he relies. It is not a sufficient averment to state that the stone is "of exceptional quality." The appellant cannot be allowed to go through a voluminous proof to shew that the rock is exceptional in use, character, and value. The grant to the railway company must not be absorbed in the exception.

It has been decided in Scotland that the mere fineness of the stone does not make it a mineral—*Menzies* v. *Earl of Breadalbane* (4)—although it could be proved that the substance was stone of very good quality. Nor is it enough to say that the stone is an "exceptional stone in use, character, and value": see *Duke of Hamilton* v. *Bentley* (5) and *Farie's Case.* (6)

No reply was asked for.

EARL LOREBURN L.C. My Lords, we have had the advantage of hearing this case argued by counsel of great eminence and

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(1) [1910] A. C. 83.
(2) 1910 S. C. 951, 961.
(3) [1910] A. C. 116, at pp. 127, 130, 133.
(4) (1822) 1 Sh. App. 225.
(5) (1841) 3 D. 1121.
(6) (1888) 13 App. Cas. 657.

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authority, but I think the order appealed from cannot be supported.

We ought always in cases of this kind to distinguish between decisions upon questions of law and decisions upon questions of fact. I am not about to repeat the law; it has been decided in this House in the *Budhill Case* (1) and in the *Glenboig Case* (2), and there is an admirable exposition also in the Lord President's judgment in the *Glenboig Case* (3), but we do not repeat every time we have to decide a case all propositions of law relevant to it.

My Lords, the judgment of the Court of Session seems to me to amount to this, that in no circumstances can freestone be a mineral within the meaning of the statute. I cannot accept that proposition. It is always a question of fact. I think myself it is very seldom that freestone is likely to be regarded as a mineral, but whether it be so or not is to be decided in regard to the particular facts of the case.

Now, my Lords, that view of the law was not really supported in argument at your Lordships' Bar, but there was substituted for it an ingenious and somewhat subtle argument to the effect that in the pleadings in this case the averments are not sufficiently specific to justify a proof. It seems to me that they are. It is stated in the pleadings that the substance in question was understood to be a mineral in the vernacular of the mining world, the commercial world, and of landowners—that was necessary. It was stated to be exceptional in use, in value, and in character. And it was stated also in the pleadings that it was not the common rock of the district or substratum of the soil, so that the exception did not, as alleged in this case, swallow up the grant. Now those averments were made. If they can be established,—I do not know in the least whether they can or not,—but if those statements can be established, then the Court may come to the conclusion that this substance is a mineral.

I have as yet failed, I am afraid, to understand wherein the averments in the pleadings are not sufficiently specific. I suppose that in the Scots law the object is to make people state

(1) [1910] A. C. 116.
(2) [1911] A. C. 290.
(3) 1910 S. C. 951, 961.

clearly what it is that they mean to prove, not to require them to state evidence, but so to aver that there is sufficient particularity and that there will not be embarrassment or surprise to their adversaries. I presume that is the general object. In my opinion it is quite sufficiently stated here.

I must observe that this point of pleading does not appear, so far as I see, to have been dwelt upon in the Court below. I am not sure that it is mentioned even in the respondents' case in this House. At all events I think it has really no substance.

It is greatly to be regretted that in cases of this kind you have to decide upon the particular facts of each case upon evidence. I do not believe myself this requirement will prove so formidable as some seem to assume; but the only alternative that I can see is to allow it to be treated as a matter of law. Now how the question whether freestone or any other kind of stone or substance which might be found in the soil is or is not a mineral within the statute can be treated satisfactorily as a matter of law really passes my understanding. There is no method except to ascertain these things as matter of fact according to the rules that have been laid down.

I therefore think that there ought to be proof in this case and that the judgment of the Court below ought to be reversed.

LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, I take the same view. I concur in the judgment proposed.

LORD SHAW OF DUNFERMLINE. My Lords, in this case the Lord Ordinary allowed a proof. It is pled by one of the parties that the stone in question formed an exception to the general rock of the district. That exception must be established by evidence, and the onus of doing so rests upon the person proponing the exception. In the pleadings of parties under the law of Scotland there is a wholesome rule to the effect that a proof will not be ordered or evidence taken upon a vacuous generality. The whole question in this case is whether this pleading can be so characterized. If so, a party would be prejudiced by the lack of sufficient notice of the other party's case.

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I cannot, my Lords, in view of the passages that have been cited from answer XI., hold that this is a mere generality in pleading. I think the specification is sufficient to entitle the Lord Ordinary to have allowed the proof, and I think the burden of proof should be where I have ventured to put it. I am accordingly of opinion that the appeal should be sustained and a proof allowed, the appellant to lead therein, as was provided by the interlocutor of the Lord Ordinary, Lord Cullen, on December 6, 1910. That interlocutor appears to me to have been in all points correct, and should be restored.

Ordered that the interlocutor appealed from be reversed ; that the Lord Ordinary's interlocutor be restored ; and that the respondents do pay to the appellant his costs here and below.

Lords' Journals, November 16, 1911.

Agents for appellant : *Balfour, Allan & North, for Dove, Lockhart & Smart, S.S.C., Edinburgh, and Borland, King, Shaw & Co., Writers, Glasgow.*

Agents for respondents : *Grahames, Currey & Spens, for Hope, Todd & Kirk, W.S., Edinburgh, and Hugh R. Buchanan, Glasgow.*

[HOUSE OF LORDS.]

THE LORD ADVOCATE AND OTHERS . . . APPELLANTS;

AND

THE WALKER TRUSTEES . . . . RESPONDENTS.

H. L. (Sc.)
1911
Dec. 1.

Dignity—Heritable Office—Fees of Honour—Prescription—Act and Treaty of Union, Rev. Stat. 1706 (6 *Anne*, c. 11).

By the Treaty of Union between England and Scotland it was provided, article 20, "That all heritable offices . . . . be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this treaty":—

Held, reversing the decision of the Second Division of the Court of Session, 1910 S. C. 1037, that this treaty did not enlarge the rights of the holders of the heritable office of Usher of the White Rod in Scotland so as to entitle them to claim fees of honour from all recipients of honours whose titles were titles of the United Kingdom of Great Britain and Ireland; and that the holders of the said heritable office were only entitled to fees from a Scotchman who received an honour or from an Englishman when he was the recipient of a purely Scottish honour.

APPEAL from interlocutors of the Second Division of the Court of Session, Scotland. (1)

This action was raised by the respondents, the Walker Trustees, who were incorporated by "The Walker Trust Act, 1877," and who claim to be the proprietors and holders of the heritable office of His Majesty's sole and principal Usher within the Kingdom of Scotland, commonly called the Usher of the White Rod. (2)

The object of the action was to recover fees and dues which it was said were payable by the recipients of certain honours of the United Kingdom from the Crown and others and to obtain a declaration that "the pursuers as proprietors and holders of all and whole the heritable office of our sole and Principal Usher within the Kingdom of Scotland are entitled to the whole fees and dues pertaining thereto and in particular and inter alia to the several fees and dues aftermentioned in respect of all creations of Dukes, Marquesses, Earls, Viscounts, Lords or Barons, Knights-Baronet and Knights of the United Kingdom of Great Britain and Ireland." The summons then set out a list of the specified fees and dues.

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(1) 1910 S. C. 1037.

(2) In *Cockburn* v. *Cockburn of Langton* the office was held adjudgable and passed to the creditors of Cockburn of Langton: (1755) 1 Pat. App. 603.

The facts and arguments of counsel are fully given in the opinion of Lord Atkinson, which was concurred in by all the other noble and learned Lords who heard the appeal.

1911. July 10 and 11. *Alexander Ure, L.A.*, and *Sir John Simon, S.-G.* (with them *S. A. T. Rowlatt* and *James C. Pitman*) (the first and last of the Scottish Bar), were heard for the appellants.

J. A. Clyde, K.C., and *J. R. N. Macphail, K.C.* (with them *Charles H. Brown*) (all of the Scottish Bar), were heard for the respondents.

The House took time for consideration.

1911. Dec. 1. Earl of Halsbury. My Lords, I have had the opportunity of reading my noble and learned friend Lord Atkinson's judgment. I agree with it, and I do not think I can usefully add anything to his reasons.

Lord Atkinson. My Lords, this is an appeal against a judgment of the Second Division of the Court of Session whereby it was declared that the respondents, a body of trustees incorporated by a private Act styled the Walker Trust Act, 1877, and admittedly the proprietors and holders of the heritable office of His Majesty's sole and principal Usher within the Kingdom of Scotland, are, as such, entitled to recover certain fees and dues, claimed to appertain to this office, from the recipients from the Crown of the following honours, titles, and dignities of the United Kingdom, namely, upon the creation of a Duke 21*l.* 13*s.* 4*d.*, of a Marquis 18*l.* 6*s.* 8*d.*, of an Earl 15*l.*, of a Viscount 10*l.*, of a Baron 6*l.* 13*s.* 4*d.*, of a Knight-Baronet 5*l.*, and of a Knight 3*l.* 6*s.* 8*d.*

The action out of which the appeal has arisen was instituted by the Walker Trustees to try their right to recover these fees on the conferring by the Crown of honours, titles, and dignities of this character. The defendants, other than the Lord Advocate, who represents the Crown and the Lords Commissioners of His Majesty's Treasury, are all persons resident in Scotland whose titles are titles of the United Kingdom of Great Britain and Ireland. Two of them, namely, Sir Charles Cayzer, Bart., and Sir Arthur Bignold, are Englishmen, and three, namely, Lord Leith of Fyvie, Sir John Wilson, Bart., and Sir Henry Cook, are Scotsmen. The last-named appellant and Sir Arthur Bignold were created knights by accolade at Buckingham Palace in the year 1904. The titles and honours of all the others were conferred about the same date by patents under the Great Seal of the United Kingdom. The right of the respondents to recover these fees is the sole question for decision.

This office of Usher or White Rod, as he is styled, is a very ancient one. It existed for centuries before the Union of the Crowns of England and Scotland on the accession of James VI. of Scotland to the English Throne as James I. of England in the year 1603. It admittedly was, and has never ceased to be, a Scottish office. Its duties, such as they were, were performed in Scotland, and did not, and could not, before the year 1707, affect or concern the holders of English or Irish peerages, dignities, or honours as such, who were not members of either of the Houses of the Scottish Parliament, did not attend either general councils or feasts at the Scottish Court, and were not resident in that kingdom.

The earliest document referred to in evidence dealing with the office is a grant of 1393, confirmed by a statute of the Parliament of Scotland, of the Barony of Langton to Alexander Cockburn, of Langton, in consideration of certain services to be rendered by him, including those of Usher of Parliaments, General Councils and Feasts. It is stated in the appellants' case, and apparently not disputed, that charters were granted by the Scottish Sovereign in the years 1510, 1542, and 1595 respectively, consolidating this Barony of Langton, and annexing to it, as a dependency, the office of Usher or White Rod with all its rights and privileges. It is further stated, and not apparently disputed, that the taking of fees by the holder of this office is first mentioned in a charter, dated in the year 1642, which, however, is not printed in the record. About five years later, on January 2, 1647, Charles I., describing himself as the King of Great Britain, France, and Ireland, by charter under the Great Seal of Scotland, granted to Sir William Cockburn and Robert Cunynghame, therein described, this office, with the privileges and advantages belonging to it, to hold during their lives; and after their decease to the heirs male and assignees of the said Sir William.

This charter contains a grant, the meaning of which was so much discussed, in the words following:—"Una cum omnibus feodis casualitatibus aliisque devoriis subscriptis solvendis per comites vicecomites Barones Majores Equites baronettos aliosque Equites quovis tempore affuturo creandos aut honores titulos et dignitates recepturos per nos nostrosve commissionarios per literas patentes aut quovis alio modo ab omnibus Scotis solvendis infra nostra dominia et similiter ab omnibus Anglis qui honores et dignitates infra dictum hoc regnum nostrum Scotiae a nobis recipiant, viz."

Then follows a list of the fees.

The next charter necessary to consider is that dated June 5, 1674. It grants this office to Sir Archibald Cockburn, son of Sir William, the former grantee, the said Cunynghame having renounced. It contains a clause differing in no respect from that above quoted from the previous patent, save that after the word "recepturos" the words "per quondam clarissimum nostrum patrem" have been introduced, and the word "nos" omitted after the preposition "per."

Now the first question one has to ask oneself is, what were the honours and dignities with which King Charles I. and King Charles II. respectively were dealing in these patents? At that period of time each of these monarchs could, as the Sovereign of England, confer English honours and dignities by patent under the Great Seal of England, as Sovereign of Ireland confer Irish honours and dignities under the Great Seal of Ireland, and as Sovereign of Scotland confer Scotch honours and dignities under the Great Seal of Scotland.

If either of these Kings sought, in respect of their grants of English or Irish honours or dignities, to exact fees from the grantees, the exaction should be authorized by an Act of the

Legislature binding upon the subject who received the grant, i.e., either a native of the particular country, or a person living or sojourning in it, and therefore under the protection of and subject to its laws. (See Coke's Institutes, part 2, vol. 2, p. 533; Comyn's Digest, title Prerogative, vol. 7, p. 65.)

Whether the law is the same in Scotland as in England on this point, it is unnecessary to discuss, inasmuch as an Act of the Scottish Parliament of September 6, 1681, ratified and confirmed the charter of June 5, 1674, granted to Sir Archibald Cockburn. This statute recites at length the charter of January 2, 1647, to Sir William Cockburn and Robert Cunynghame, and translates into English the clause in that patent, the meaning of which is in controversy, in the following passage: "All and sundry the fees, duties, casualties, and profits belonging to the said office within the Kingdom of Scotland according to the custom thereof, viz., all and sundry casualties, fees, and composition accressing and belonging to the said office of Principal Usher to His Majesty, and those who exercise the same within the said Kingdom of Scotland, and which were in use to be paid to the said Usher for infeftments of lands passing the Great Seal within the said kingdom either by resignations, confirmations, or new gifts, with all fees, casualties and other duties underwritten, payable by earls, viscounts, lords, knight baronets and other knights to be made in all time coming, or who should receive honours, titles, or dignities from His Majesty's said father or His Majesty's Commissioners by Patents or any other way To be paid by all Scotsmen within His Majesty's dominions, and also by Englishmen who shall receive any honours or dignities from His Majesty within the said Kingdom of Scotland."

I have modernized the spelling of the passage. It then sets out that in "corroboration" of all rights and securities granted to Sir Archibald Cockburn and his predecessors, His Majesty granted and confirmed to him, his heirs and assigns, amongst other things, "all fees casualties above payable by dukes, marquesses, earls, viscounts, lords, knight baronets, and other knights, made or to be made, and who shall receive honours, titles and dignities by patent or any other way, and payable by all Scotsmen who shall receive dignities within any of His

Majesty's dominions, and by all Englishmen who have already obtained and who hereafter shall obtain honours or dignities from His Majesty and his successors within the said Kingdome of Scotland." By this patent a salary of 250*l.* sterling per annum was granted to Sir Archibald Cockburn and his assigns, holders of this office, to be paid out of the "first and rediest of the rents duties and casualties payable to His Majesty within the said Kingdome of Scotland." This is, if I may so call it, the first stage in the documentary history of the office of "White Rod." No mention is made of the Great Seals of England or Ireland, nor is any English or Irish statute referred to dealing with any of those charters or the fees granted by them. And it would certainly appear to me to be impossible to read over these ancient documents without coming to the conclusion that the honours, titles, and dignities dealt with by them are Scottish honours, titles, and dignities; that is, honours, titles, and dignities each of the several monarchs as Sovereign of the Kingdom of Scotland had power to grant, and to those honours, titles, and dignities alone. It was, as I understood, contended by Mr. Clyde, in his ingenious argument, that, owing to the presence of the words "payable by all Scotsmen within our dominions," the patent applies to honours, titles, and dignities conferred upon Scotsmen by the King, as Sovereign of England, under the Great Seal of England, or as Sovereign of Ireland under the Great Seal of Ireland, and further that there would be nothing illegal or unconstitutional in the Scottish Parliament passing an Act requiring a Scotsman in whatever part of the three kingdoms he might receive one of those honours, titles, or dignities, or be domiciled, to pay to this Scottish official a fee upon receiving it, inasmuch as he, being a Scottish subject, wherever he might be, owed allegiance to his Scottish Sovereign and submission to the Scottish Parliament.

Mr. Clyde may possibly be right upon this point, though legislation of such a kind as he suggests would be somewhat unjust and altogether anomalous. I cannot, however, adopt the construction for which he contends. I think the words "to be paid by all Scotsmen within His Majesty's dominions" were introduced in order to make those fees recoverable from the Scottish grantee by reason of his nationality in whichever of the three kingdoms he might be resident, or might receive the honour, whereas the English recipient of Scottish honours and dignities could only be reached by a Scottish statute or by a judgment of a Scottish Court if he came within that kingdom. These provisions touching the payment of these fees do not alter the conclusion to which I have come as to the nature of the honours, titles, and dignities dealt with. That this was the view of the Crown and of the Scottish Legislature some few years before the Union is, I think, suggested by the wording of the charter of resignation in favour of Alexander Cockburn, Junior, of Langton, dated January 21, 1686, and in the Scottish statute confirming it, passed on June 15 in the same year. The words in the charter dealing with those fees run thus: "Una cum omnibus feodis casualitatibus aliisque censibus subscriptis solvendis per duces Marchiones Comites Vicecomites dominos milites Baronettos aliosque equites, creatos et creandos ac honores titulos et dignitates a nobis vel successoribus nostris aut commissionariis nostris per literas aut quovis alio modo recepturis ac solvendis per omnes Scoticas" (sic) "dignitates, intra quaecunque nostrorum dominiorum recipientes, ac per omnes Anglos qui hactenus assiquuti sunt vel in posterum honores et dignitates a nobis vel successoribus nostris in dicto Regno nostro assequentur." And the confirming statute, though it contains, near the end of it, a general clause of ratification of the patent, recites the charter intended to be ratified as granting all "new gifts with all casualties, fees, and other rents underwritten payable by dukes, marquesses, viscounts, lords, knights baronets, and other knights created, or to be created, and receiving honours, titles, and dignities from His Majesty and his successor within the said Kingdom of Scotland."

It certainly appears to me, therefore, that the rights of the Usher of the White Rod were at the time of the Union simply these: (1.) He was entitled to receive the stipulated fees from the recipients of honours conferred by the King as Sovereign of Scotland; (2.) he could recover those fees from a Scotsman in whatever part of the King's dominions he, the grantee, might be when he received the honour, dignity, or title; and (3.) he could recover the like fees from all Englishmen whenever they received

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those honours in Scotland, and could, therefore, be reached by the tribunals of that country.

The next question is, Did the Treaty and Act of Union alter the White Rod's position, enlarge, or curtail his rights? In my view articles 20 and 23 of the treaty left his rights precisely as they were, though, no doubt, they made less lucrative the enjoyment of them. The 20th article runs as follows: "That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland, notwithstanding this treaty."

It left to this officer all the rights of property he then enjoyed by the law of Scotland by virtue of his office. The operation of this and the 23rd article may, so far as he is concerned, be harsh and oppressive in this, that, as peers of Scotland could not thenceforth be created, he lost the fees which but for the treaty he would have received. This is undoubtedly so, but while such a consideration might possibly give the trustees a strong claim upon the bounty of the Crown, it cannot affect the question of the proper construction of the treaty and the ancient documents of earlier date. That is a pure question of law, and is, moreover, the only question for the decision of your Lordships. The Lord Ordinary, the judges in the Second Division, and, indeed, counsel in argument, have each and all failed, I think, to point out what is the alleged ambiguity in this article of the treaty, or, indeed, in the earlier documents which the usage or practice obtaining from 1766 downwards touching the payment through the Treasury of these fees by all recipients of honours, titles, and dignities of the United Kingdom was admitted in evidence to explain, or to remove, and have also failed to shew how it aided in determining the subject-matter to which any one of these documents applies, or in fixing the limits of the rights they confer.

As against a plain statutory law no usage can prevail: see Lord Brougham, *Magistrates of Dunbar* v. *Duchess of Roxburghe* (1); Lord Campbell C. J., *Gorham* v. *The Bishop of Exeter*. (2) In *Hebbert* v. *Purchas* (3) Lord Hatherley is

(1) (1835) 3 Cl. & F. 335, 358.
(2) (1850) 15 Q. B. 52, at p. 73.
(3) (1871) L. R. 3 P. C. 605, at p. 650.

reported to have said: "It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law in determining the true construction of obscurely framed documents." In *The Trustees of Clyde Navigation* v. *Laird & Sons* (1) Lord Watson says: "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested as evidencing what must presumably have been the intention of the Legislature at that remote period." And in a recent case in your Lordships' House, *Winstanley* v. *North Manchester Overseers* (2), it was held that a rector of a parish was rateable under the 43 Eliz. c. 2 in respect of the burial fees he received as occupier of the parish burial ground, notwithstanding the fact that for over three centuries the practice had been not to rate him.

It may be doubted in the present case, however, whether the persons who paid these fees knew anything whatever of the right by virtue of which they were demanded, or whether the payment could be described, to use the language of Lord Watson, as having been made with the consent of all parties interested; but however that may be, the payment of the fees for even 150 years from the year 1766, though undoubted, is, I think, irrelevant, and cannot affect the meaning of the documents your Lordships have to construe, inasmuch as their language is plain and unambiguous. So that the question for decision, in my view, narrows itself down to this: Is an honour or other title or dignity of the United Kingdom, conferred since 1707, a Scottish title, dignity, or honour within the meaning of the foregoing charters and patents of the Scottish King and statutes of the Scottish Parliament?

I concur with Lord Low, and, as I understand, with the other learned judges in the Second Division, in thinking that a post-Union title or dignity or honour is a wholly different thing from the title, dignity, or honour conferred before the

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(1) (1883) 8 App. Cas. 658, at p. 673.

(2) [1910] A. C. 7.

Union by the King of Scotland in the exercise of his Royal prerogative as Sovereign of that kingdom.

Where I differ from him and them is in the conclusion that the 20th article of the Treaty of Union is ambiguous in its language, and that because of that the usage of the last 150 years can be relied upon to secure to this officer fees in respect of the honours, titles, and dignities created since its date which are not Scottish honours, titles, or dignities in the sense I have indicated. In my view, the Treaty of Union left the office as it was, with the rights which under the law of Scotland the holder of it theretofore enjoyed in respect to the creation of Scottish honours, titles, and dignities properly so called, and nothing more.

The order of knighthood is not in any sense a local title. It is an order of chivalry recognizable in every part of the King's dominions, and differs in that respect altogether from an earldom conferred by the King as Sovereign of the Kingdom of Scotland. See *Sir John Douglas's Case*, Y. B. 20 E. IV. 6, cited in *Calvin's Case*, 7 Co. Rep. 15*b*, 16*a*.

In my opinion, therefore, the interlocutors appealed from are erroneous and should be reversed, and this appeal be allowed with costs.

LORD KINNEAR. My Lords, I agree entirely with all that has been said by my noble and learned friend opposite, and I therefore think it unnecessary to detain your Lordships by stating my own reasons, which are entirely in accordance with his.

LORD GORELL. My Lords, I have had the opportunity of reading and considering the judgment of my noble and learned friend Lord Atkinson, and I fully concur with it.

Ordered that the interlocutors appealed against be reversed and that the respondents pay the appellants their costs here and below.

Lords' Journals, December 1, 1911.

Agent for appellants: *Solicitor to the Treasury, for Thomas Carmichael, S.S.C., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for George J. Wood, W.S., Edinburgh.*

[HOUSE OF LORDS.]

BANKNOCK COAL COMPANY, LIMITED . . APPELLANTS; H. L. (Sc.)

AND

LAWRIE . . . . RESPONDENT.

1911
Dec. 12.

Employer and Workman—Competency—Claim by Father of Deceased Employee against Son's Employers—Scottish Law—Sheriff Courts (Scotland) Act, 1907 (7 *Edw.* 7, *c.* 51), *s.* 30—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *ss.* 13, 14.

In an action in the Sheriff Court, Scotland, the father of a lad, unforisfamiliated, who met his death by accident, sought damages, either at common law, or alternatively under the Employers' Liability Act, 1880, from the defenders, the employers of the deceased. The father alleged that the deceased had contributed all his earnings to his parents for maintenance of the home. The sheriff allowed the case to go to proof. The father then applied that the case should be remitted to the Court of Session for trial by jury by virtue of s. 30 of the Sheriff Courts (Scotland) Act, 1907. The defenders contended that the procedure adopted by the pursuer was incompetent under ss. 13 and 14 of the Workmen's Compensation Act, 1906:—

Held, affirming the decision of the First Division of the Court of Session, 1911 S. C. 817, that the procedure was not incompetent, for although it might be that the effect of ss. 13 and 14 of the Workmen's Compensation Act, 1906, was to bar any appeal to the Court of Session except on a question of law, the right if taken away by the Act of 1906 had been restored by s. 30 of the Sheriff Courts (Scotland) Act, 1907.

APPEAL from an interlocutor of the First Division of the Court of Session, Scotland. (1) The facts are sufficiently given in the opinion of Lord Gorell.

1911. Nov. 20, 21. *Scott Dickson, D.F.,* and *Harold W. Beveridge* (the former of the Scottish Bar), for the appellants. Sect. 14 of the Workmen's Compensation Act, 1906 (2), prevents the removal of this action to the Court of Session, and, therefore, the allowance of the remit by the sheriff was incompetent. The definition of the word "workman" is given as including his personal representative or his dependants (2), so that the respondent, to whom compensation is payable, is a "workman"

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(1) 1911 S. C. 817.

(2) See note on p. 116, post.

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within the meaning of the Act, and cannot have his case removed to the Court of Session. The whole object of the Sheriff Courts (Scotland) Act, 1907, was to simplify procedure and not to encourage costly litigation. Therefore the prohibition of appealing to the Court of Session was not taken away by the Act of 1907. By ss. 30 and 31 of the Act of 1907 (1), all causes originating in the sheriff court, Scotland, are divided into two categories: First, those which are raised by the employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers Liability Act; and secondly, all other causes which do not fall under the first category. Sect. 31 introduces in civil cases a system of jury trial in the sheriff court for the first time, and provides that all causes which fall under the first category may be so tried on the application of either party. Causes which do not fall under the first category are by s. 30 allowed to be removed to the Court of Session for jury trial there, and among the cases removable to the Court of Session under s. 30 are actions by employees against employers which do not found on the Employers' Liability Act, 1880. The intention of ss. 30 and 31 was to institute a system of jury trial in the sheriff court for all causes in which the pursuer, being a person entitled to compensation under the Workmen's Compensation Act, 1906, chooses to waive that right and claim under the Employers' Liability Act, 1880, either alone or alternatively to a claim at common law. The object was that this class of cases should be brought to a speedy termination by jury trial in the sheriff court, and the intention of s. 30 was to exclude actions entitled to such jury trial from removal to the Court of Session for trial there. This view of the Sheriff Courts Act is in harmony with s. 14 of the Workmen's Compensation Act, 1906, which prevents removal in such cases. Here the father was a dependant of the deceased to whom compensation was payable, and the definition in s. 13 is carried into s. 14. "Workman" there is what is defined in the preceding section (s. 13), and it is contended that this was an action which fell under s. 14 of the Act of 1906, and that the pursuer was a "workman": *Main Colliery Co.* v. *Davies.* (1) Under the Act of 1906 this action could not be removed, so that s. 30 of the Sheriff Courts (Scotland) Act, 1907, does not apply to a "workman" at all, and s. 31 for the first time allows a trial by jury. The word "employee" in s. 31 of the Act of 1907 means not only the actual workman, but also his personal representatives, who are able to make claims under the Employers' Liability Act, 1880. That interpretation is one which simplifies instead of disorganizing the operation of the Sheriff Courts (Scotland) Act, 1907. Sect. 52 of that Act does not repeal the specific enactment contained in s. 14 of the Workmen's Compensation Act, 1906. If the pursuer is not a dependant, he is the legal representative of his son. Lord Johnston said, referring to s. 13 of the Act of 1906, "Primarily this refers to compensation under the Act. But when applied to s. 14,—unless 'workman' is to have a different meaning in s. 14 from that which it has in the rest of the Act, which the context does not provide,—then, having regard to the terms of s. 14 and to those of the Employers' Liability Act, 1880, compensation has, I think, a different and wider meaning, the result being that the restriction of removal and appeal to the Court of Session covers not merely actions raised by the workman himself but those raised by the specified relations after his death." The learned judge must be taken to have held that if the question stood alone on s. 14 the appeal to the Court of Session must be refused, but he held that s. 14 fell under the repeal in s. 52 of the Act of 1907. But if the Legislature had intended a repeal it would not have put the repealing words in a schedule.

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(1) See note on p. 117, post.

Munro, K.C., and *A. Mackenzie Stuart* (both of the Scottish Bar), for the respondent. The respondent is entitled to have the action remitted to the Court of Session for trial by jury. He is not an "employee" of the appellants and the claim is not one against the respondent's employers, but by the father of a deceased employee suing on his own behalf and not as the legal representative of his deceased son.

By the common law of Scotland the parent of a son who has been killed through the fault of some other person has an action against the wrong-doer for solatium and damages. This right was not affected by the Employers' Liability Act, 1880, but in a case where the person sued was the employer of the deceased the Act deprives such employer of the defence that the accident was due to the fault of a fellow servant.

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(1) [1900] A. C. 358.

The Act provided that an action under the Employers' Liability Act, 1880, or for damages at common law and alternatively under that Act must in the first instance be raised in the sheriff's court. But so soon as proof is allowed in such an action the pursuer has the right to have the case removed to the Court of Session: Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 6, sub-s. 3; Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. c. 50), s. 9; Judicature (Scotland) Act, 1825, s. 40. (1) This would have been the right of the respondent before 1906. The respondent contends that if this right was taken away by the Workmen's Compensation Act, 1906 (2), it was restored by the Sheriff Courts (Scotland) Act, 1907. (2) Under the Act of 1880 it was the absolute right of the pursuer to remove the action to the Court of Session. It is, however, contended by the appellants that the Act of 1906 takes away this previously existing right. Sects. 13 and 14 of the Act are relied upon by the appellants and must be strictly construed. But it is submitted that the right of the pursuer to have his action for damages under the Employers' Liability Act, 1880, or alternatively at common law removed to the Court of Session for trial by jury is not affected by these sections. Sect. 14 is a Scottish procedure section pure and simple, foreign to the rest of the Act and dealing with actions at common law. It does not per se exclude the respondent's right. It excludes the right of a workman to enter his cause in the Court of Session, but the respondent is the father of the workman and his right is not excluded. The result of the appellants' argument is to give to the word "workman" a far wider meaning than is given to it by the definition clause, s. 13.

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(1) Sect. 40 of the Judicature (Scotland) Act, 1825 (6 Geo. 4, c. 120), provides: ". . . . it is expressly provided and declared that in all cases originating in the inferior Courts in which the claim is in amount above 40*l.* as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts . . . . it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by Bill of Advocation, which shall be passed at once without discussion and without caution . . . ."

(2) See note on p. 117, post.

But these sections have no application to this case. "Workman" in s. 13 refers solely to the provisions of the Act of 1906 dealing with workmen's compensation and does not apply to s. 14, which deals with actions for damages at common law and under the Act of 1880 and not under the Act of 1906. S. 14 has a definition of its own, and the definition of "workman" under the Acts of 1880 and 1906 is different. Under the Act of 1880 and the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10, certain persons could not sue, namely, domestic servants. By s. 8 of the Act of 1880 (43 & 44 Vict. c. 42) "workman" means a railway servant, &c. The respondent therefore submits that the interpretation of "workman" given in s. 13 refers solely to the provisions of the Act of 1906 dealing with workmen's compensation and does not apply to s. 14, and that "workman" under s. 14 of the Act of 1906 must mean "workman" as intended by the Act of 1880. The respondent is not suing as the legal representative of the deceased, or as a dependant or other person to whom or for whose benefit compensation within the meaning of the Workmen's Compensation Act, 1906, is payable, but he sues on his own behalf in virtue of his common law right. And in any event ss. 13 and 14 are not applicable to a case where the fact of dependency is irrelevant to the right to sue. Under the Act of 1907 all cases, where the claim is above 50*l.*, can be removed to the Court of Session, except where an "employee" is suing an employer. The word "employee" has a clear meaning of its own and does not mean the father of the "employee." The appellants invite the House to attach to the word "employee" a peculiarly artificial meaning. Here the respondent is not an employee, and further, he is not suing an employer. Sect. 52 of the Act of 1907 repeals s. 40 of the Judicature (Scotland) Act, 1825 (6 Geo. 4, c. 120), which gave the right to remove an action such as the present one to the Court of Session for jury trial, but s. 30 of the Act of 1907 substantially re-enacts s. 40 and provides for the removal to the Court of Session for jury trial of cases originating in the sheriff court,

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"other than claims by employees . . . ." That exception does not include the present action.

If the right to have an action originating in the sheriff court and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law removed to the Court of Session is taken away by s. 14 of the Workmen's Compensation Act, 1906, then that section is inconsistent with s. 30 of the Sheriff Courts (Scotland) Act, 1907, and in that event s. 14 of the Act of 1906 has been repealed by s. 52 of the Sheriff Courts (Scotland) Act, 1907, which provides for the repeal of all laws and statutes inconsistent with the provisions of the last-mentioned Act. The decision of the First Division in this case is supported by the decisions in *Cook* v. *Bonnybridge Silica and Fire-Clay Co.* (1), *Brown* v. *Glenboig Union Fire-Clay Co.* (2), and *Docherty* v. *Niddrie and Benhar Coal Co.* (3) In each of those cases the decision of the Court supports the view that the parent of a deceased workman who sues for damages at common law and alternatively under the Employers' Liability Act of 1880 is entitled, on proof being allowed, to have the cause remitted to the Court of Session for jury trial in terms of s. 30 of the Sheriff Courts (Scotland) Act, 1907. See also Lord Watson in *Clarke* v. *Carfin Coal Co.* (4), that an action for solatium differs entirely from any other action for damages. There is no definition clause in the Act of 1907 giving a meaning to the word "employee," but the appellants attempt to put "workman" and "employee" on the same footing by reference to a different Act.

Harold W. Beveridge replied.

The House took time for consideration.

1911. Dec. 12. Earl Loreburn L.C. My Lords, it is our duty, as I understand it, to construe Acts of Parliament so as to give effect to what we are satisfied was the intention of Parliament, if the language used admits of that construction. But we are not at liberty to amplify an enactment so as to include within its ambit matters which upon the plain meaning

(1) 1911 S. C. 177.

(2) 1911 S. C. 179.

(3) Reported on another point, (1911) 1 S. L. T. 396.

(4) [1891] A. C. 412, at p. 418.

of the language are not included, even if convinced that the omission was inadvertent and undesigned.

In the present case the question raised is whether or not the pursuer was entitled to have the cause remitted for trial by jury to the Court of Session. I cannot help thinking that it was probably intended in 1906 to preclude the remittal of a cause like this. Possibly it was not intended in 1907 to undo what was thought to have been done in 1906. But I also think that it was undone in 1907.

Upon this subject I agree with the reasoning of Lord Johnston. Taking ss. 13 and 14 together of the Workmen's Compensation Act, 1906, it seems to me that removal and appeal to the Court of Session are barred (save on a question of law) not only where the action is raised by the workman himself, but also where it is raised by his legal personal representative or his dependants, or other persons to whom or for whose benefit compensation is payable. No doubt this is expressed awkwardly by a mere definition clause; and in view of the contrary opinion expressed by the Lord President I cannot say it is free from doubt. I feel that this view leaves anomalies and may make the right to appeal turn upon the dependency of a father upon a deceased son, which may be a disputed fact and may be irrelevant to the action, as pointed out by the Lord President. But I think upon the whole that these sections have the effect described by Lord Johnston, though I do not desire to rest my conclusion upon that ground.

I agree with the Lord President, and the other Lords of Session, that the right, if taken away by the Act of 1906, was restored by the Sheriff Courts Act of 1907, s. 30. That section expressly gives the right to remit, as was done here, "in cases originating in the sheriff court other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880."

Here we have, in this case, an action by the father of a deceased workman, claiming damages for the death by accident of his son against the employers of the son, resting upon common law, or alternatively upon the Employers' Liability Act, 1880. How am I to say that this is a claim by an "employee"? There is no definition clause which can be invoked to enlarge the meaning of the word "employee." I do not know whether or not Parliament intended that the employee's father should be in the same position as the employee himself, but it certainly has not said so. I feel that so to hold, as we are asked by the appellants to hold, would be to usurp the function of the Legislature.

I am therefore of opinion that the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur, and I have only this to add: that though it is not necessary for the decision of this case, as I understand it, to decide what exactly is the meaning of the word "workman" as it occurs in the 14th section of the Workmen's Compensation Act, 1906, still undoubtedly the present inclination of my opinion is that that section was meant to deal with all actions under the Workmen's Compensation Act which could be raised in Scotland, and that therefore the word "workman" must get the extended meaning put upon it by the definition clause. That certainly is the inclination of my opinion at present, but I hold myself quite free to reconsider the point should it again come before your Lordships' House for decision.

LORD GORELL. My Lords, the question in this appeal is whether the respondent, who brought an action for damages in the sheriff court, alternatively at common law or under the Employers' Liability Act, 1880, has the right to remove the cause for trial to the Court of Session, or whether the action must be tried in the Court where it was brought. The respondent is the father of a workman who was killed in the appellants' mine on September 21, 1910. The respondent brought an action against the appellants as employers, concluding for damages 500*l*. at common law or alternatively 179*l*. 8*s*. in the name of compensation under the Employers' Liability Act, 1880, and inter alia averred that the deceased was his only unforisfamiliated son, and contributed all his earnings to his parents for the maintenance of the house. The appellants in their answer admitted the respondent's right as a dependant to compensation under the Workmen's Compensation Act, 1906.

The respondent removed the cause to the Court of Session, relying on s. 30 of the Sheriff Courts (Scotland) Act, 1907, which provides for such a remit except in certain specified cases. The appellants contended that the present case was one of those specifically barred not only by the Sheriff Courts (Scotland) Act, 1907, but also by the Workmen's Compensation Act, 1906, but the First Division of the Court of Session, on March 17, 1911, held that the cause had been competently remitted, and allowed issues for the trial of the cause in the Court of Session.

Leave to appeal to your Lordships' House was granted on May 13, 1911.

The contention on behalf of the appellants is that the remit was incompetent and contrary to law. Whether this contention is correct or not depends upon the construction of the two Acts last mentioned.

I preface the consideration of those two Acts by referring to two earlier Acts, namely, the Employers and Workmen Act, 1875, and the Employers' Liability Act, 1880.

The Act of 1875 was an Act the object of which was to enlarge the power of county courts in England, the sheriff courts in Scotland, and the Civil Bill Court in Ireland, in respect of disputes between employers and workmen, and to give Courts of summary jurisdiction a limited jurisdiction in respect of such disputes. The expression "workman" in the Act was defined as not including a domestic or menial servant, but included other persons as therein expressed engaged in manual labour under a contract with an employer.

The Act of 1880 was entitled thus, "An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service"; and s. 1 provided that where, after the commencement of this Act, personal injury is caused to a workman in the five cases mentioned therein, "the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." Sect. 2 dealt with exceptions to amendment of the law, and s. 3 limited the amount of compensation recoverable under the Act to an amount of three years' earnings estimated as provided.

Under s. 6 every action for recovery of compensation under the Act is to be brought in a county court in England, a sheriff court in Scotland, and a civil bill court in Ireland, but might, on the application of either party, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a county court may by law be removed. This would be by certiorari or otherwise if the High Court or a judge thereof should deem it desirable that the action should be tried in the High Court. In Scotland the action might be removed to the Court of Session at the instance of either party in the manner provided by and subject to the conditions prescribed by s. 9 of the Sheriff Courts (Scotland) Act, 1877.

By s. 8 of the Act of 1880 the expression "workman" means a railway servant and any person to whom the said Act of 1875 (38 & 39 Vict. c. 90) applies. The Act of 1880 has been continued from time to time and remains in force as amended by s. 14 of the Workmen's Compensation Act, 1906.

In the Workmen's Compensation Act, 1906, s. 13 gives, "unless the context otherwise requires," certain definitions. A fresh definition of "workman" is given among a number of other definitions, and "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." Sect. 14 contains the special provision as to Scotland(1) which is set out at p. 8 of the appendix. According to it, in Scotland, where a workman raises an action against his employer independently of the Act, in respect of any injury caused by accident arising out of or in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the Act of 1880 or alternatively at common law or under the Act of 1880, shall, notwithstanding anything contained in that Act, not

(1) See note on p. 117, post.

be removed under the Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law.

The last Act to refer to is the Sheriff Courts (Scotland) Act, 1907 (1), ss. 30 and 31 of which are set out in the appendix, pp. 8 and 9. Sect. 30 allowed of the removal, by either party to the Court of Session, of cases originating in the sheriff court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the said Act of 1880, or alternatively at common law or under the said Act of 1880) where the claim is in amount or value above 50*l.* Certain powers in the Court of Session to remit were given. Sect. 31 gave a right to either party to have a jury trial before the sheriff in any action in the sheriff court of the kind excepted in the 30th section where the claim exceeds 50*l.*, and s. 52 repealed the enactments mentioned in the Second Schedule to the Act to the extent therein mentioned, and all laws, statutes, Acts of Sederunt, orders and usages then in force so far as the same are inconsistent with the provisions of the Act.

If the question depended solely on the Sheriff Courts Act of 1907, I think that it would be free from any doubt, because the action is not an action by an employee against an employer in any ordinary sense. But it is said that employee and employer must be read in a sense different from the ordinary because of the earlier legislation, especially ss. 13 and 14 of the Act of 1906.

I think, however, though with considerable doubt, that it would be straining language to hold that "where a workman raises an action against his employer" in s. 14 of the Act of 1906 the words used include an action such as the present; and although the term "workman" may, according to the 13th section, include other persons where the context does not otherwise require, I am unable to read the 14th section as using the term in its wider signification. It looks to me as if the interpretation clause, s. 14, had not been introduced with reference to the special provisions as to Scotland.

(1) See note on p. 117, post.

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However this may be, I think that the express provisions of the Act of 1907 remove any difficulty or doubt, and I agree with the views on this point expressed by the Lord President.

It seems to me that when the 14th section of the Act of 1906 and the Act of 1907 were passed, it must have escaped attention that claims could be made otherwise than by an employee, but whatever may have been the intention I do not see how the express terms of the Act of 1907 can be overcome.

In my opinion the decision of the First Division should be affirmed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the Lord Chancellor, and I largely share the views just expressed by my noble and learned friend Lord Atkinson.

If the range of vision be narrowed to the meaning of the word "employee" the conclusion is inevitable. And I agree that in the interpretation of this Act it must be so narrowed. The words of the Legislature not being ambiguous, the duty of the Judiciary is not doubtful.

The results may be unfortunate, unexpected: it may be, as was argued, that a scandal continues. If so, Parliament will note these things. But with regard to them it is beyond the function of a Court of interpretation to give relief, and perhaps even beyond its province to express views or to proffer opinions.

Ordered that the interlocutor appealed from be affirmed; and that the appeal be dismissed with costs.

Lords' Journals, December 12, 1911.

Agents for appellants: *Beveridge, Greig & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *R. S. Taylor, Son & Humbert, for Macpherson & Mackay, S.S.C., Edinburgh, and Fleming & Buchanan, Stirling.*

NOTE.—Sect. 13 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), provides:

"*Definitions.*—In this Act unless the context otherwise requires . . . . any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom or for whose benefit compensation is payable."

Sect. 14 provides:

"*Special Provisions as to Scotland.*—In Scotland where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action if raised in the Sheriff Court, and concluding for damages under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), or alternatively at common law or under the Employers' Liability Act, 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule to this Act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this Act shall apply."

Sect. 30 of the Sheriff Courts (Scotland) Act, 1907 (7 Edw. 7, c. 51), provides:

"*Removal of Cause for Jury Trial.*—In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, where the claim is in amount or value above 50*l.*, and an order has been pronounced allowing proof (other than an order for proof to lie in retentis or for recovery of documents) it shall, within six days thereafter, be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose where it shall be so tried: provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a judge of the Division before whom the cause depends."

Sect. 31:

"*Jury Trial in Sheriff Court.*—In any action raised in the Sheriff Court by an employee against his employer concluding for damages under the Employers' Liability Act, 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds 50*l.*, either party may, so soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the sheriff shall appoint the action to be tried before a jury of seven persons . . . ."

Sect. 52:

"*Repeal of Statutes.*—The enactments mentioned in the Second Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of that schedule, and all laws, statutes, Acts of Sederunt, orders and usages now in force so far as the same are inconsistent with the provisions of this Act, are also hereby repealed. But provided that all actions pending at the date of the commencement of this Act shall nevertheless

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proceed to final determination in all respects as if this Act had not been passed."

Second Schedule (s. 52).

Session and Chapter.	Short Title.	Extent of Repeal.
6 Geo. 4, c. 120	The Court of Session Act, 1825.	Section 40, so far as relating to appeal for jury trial from Sheriff Court to Court of Session.
31 & 32 Vict. c. 100	The Court of Session Act, 1868.	Sections 65, 66, 67, 68, 69, 70, 73 and 79, so far as those sections relate to appeals from Sheriff Court.
40 & 41 Vict. c. 50	The Sheriff Courts (Scotland) Act, 1877.	The whole Act.

[HOUSE OF LORDS.]

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Dec. 14

FARMER (Surveyor of Taxes) . . . . Appellant;

and

SCOTTISH NORTH AMERICAN TRUST, LIMITED . . . . Respondents.

Revenue—Income Tax—Profits of Trade—Interest payable on Loans—Deductions—Income Tax Act, 1842 (5 & 6 *Vict.* c. 35), s. 100, *Sched. D., First Case, rr.* 3, 4.

The respondent company carried on an investment business and had under its memorandum of association power to borrow and raise money by way of loan, discount, cash, credit, overdraft, &c., and further to grant security for any sums of money so borrowed. In the course of its business the company purchased in New York bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the respondents' available cash, and certain of the securities which were lying in New York they pledged to their bankers in New York, in consideration of which the bankers allowed the respondents' banking account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the respondents bought and sold securities, and they were charged periodic interest at current rates from day to day. In 1906 they opened a loan account, in addition to the overdraft, with their bankers, on which the bankers granted a loan not exceeding

$200,000 for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated and the balance transferred to current account. The bank collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the respondents. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month the interest was debited to the overdraft on the current account. The respondents in stating their profits for assessment for income tax deducted the amount of interest paid to the bankers, but this deduction was disallowed by the Commissioners on the ground that the interest in question was interest on capital employed in the business of the company and therefore could not properly be deducted from the profits of the business:—

Held (affirming the decision of the First Division of the Court of Session, 1910 S. C. 966), that the Commissioners were wrong in their decision, for the money borrowed by the respondents could not be treated as "capital" within the meaning of the Income Tax Acts; and the interest paid for the use of the money was an outgoing by means of which the respondents procured the use of the thing by which they made a profit and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which were earned by them.

Anglo-Continental Guano Works v. *Bell* (1894) 3 Tax Cases, 239, distinguished.

APPEAL from a decision of the First Division of the Court of Session, Scotland (1), sitting as the Court of Exchequer in Scotland. The judgment was dated July 16, 1910.

The facts are sufficiently given in the opinion of Lord Atkinson.

1911. Nov. 21, 23. *Sir Rufus Isaacs, A.-G.*, and *William Hunter, S.-G. for Scotland* (with them *J. A. T. Robertson*), (the two latter of the Scottish Bar), for the appellant. The question is whether the deduction claimed by the respondents in respect of interest paid by them to bankers in America upon loans made to them by the said bankers should be allowed in arriving at the assessable profits of the respondents for the purposes of the Income Tax Acts (2): Dowell, 163, 164, 183.

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(1) 1910 S. C. 966.

(2) The Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sched. D, first case, r. 1, provides that the duty to be charged in respect of any trade, manufacture, adventure, or

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It is clear that the sums borrowed by the respondents were borrowed for the purpose of being employed as part of their capital, and the fact that the respondents borrowed upon overdrafts and short loans does not give them a right to have the interest paid deducted from the profits of the business: *Anglo-Continental Guano Works* v. *Bell.* (1) That case cannot be distinguished from the one under consideration. The Court of Session did not think themselves bound by that case, therefore there is a conflict of view between the two countries. Where capital is lent to a person to carry on his business and he employs that money as additional capital in his business he is brought within the words of the Act which were introduced for that very purpose. The question is always one of degree. It is a question of fact whether or not the money which is used is used as additional capital for the purpose of the business. There is no distinction between borrowing the money to buy particular cargoes of guano, as in *Anglo-Continental Guano Works* v. *Bell* (1), and borrowing the money for the purpose of buying

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concern in the nature of trade, "shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed: Provided always that, in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same . . . ."

The third rule of the first case provides that "in estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains . . . . for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern . . . . nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern, nor on account or under pretence of any interest which might have been made on such sums if laid out at interest, nor for any debts . . . ."

(1) (1894) 70 L. T. 670; 3 Tax Cases, 239.

bonds. In each case the borrower is carrying on a business. In each case the money is borrowed for the purpose of the business. The sums borrowed were employed as additional "capital" in the concern within the meaning of r. 3. If the company had borrowed the money required by them upon debentures from persons resident abroad and not liable to income tax no deduction would have been allowed: *Alexandria Water Co.* v. *Musgrave* (1), considered in the case of *Gresham Life Assurance Society* v. *Styles*. (2)

In *Alexandria Water Co.* v. *Musgrave* (1) it was held that debenture interest paid by an English company whose works and property were at Alexandria to debenture-holders residing in Egypt could not be admitted as a deduction from the profits of the company. In the case of *Gresham Life Assurance Society* v. *Styles* (2) part of the society's business was to sell or grant annuities, and the question arose there whether or not the society was entitled in making up the balance-sheets shewing the amounts of its profits to deduct from its gross income the sums which were paid in discharge of its annuity contracts; and this House held that the grant of annuities was part of the business, and that it had to pay them out of its profits and gains, and that consequently in such a case the society were entitled to deduct them.

The Court below relied on a passage in Dowell, 6th ed., p. 188, to the effect that in practice such interest had always been allowed as a deduction up to the time of the decision in *Anglo-Continental Guano Works* v. *Bell* (3), and that "it had since continued to be so allowed." That is, no doubt, correct with regard to English bankers, but it is not the case with foreign bankers. Had the loan here been obtained from English bankers the revenue authorities would not have raised the question, because in that case the interest paid to the English bankers would have been liable to income tax when the profits of the bank were taxed, or it would be got at in some other way.

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(1) (1883) 11 Q. B. D. 174; 1 Tax Cases, 521.

(2) [1892] A. C. 309.

(3) 70 L. T. 670; 3 Tax Cases, 239.

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In *Arizona Copper Co.* v. *Smiles* (1) a large sum of money was borrowed and a bonus of 10 per cent. was to be paid to the lenders along with interest. It was sought to deduct the bonus of 10 per cent., and the question was whether or not they could deduct it, and the Court refused to allow the deduction.

The question is not whether a merchant would regard the interest paid upon the loans as profit, but whether the Income Tax Acts remove it from the area of taxation.

Atkin, K.C., and *Lord Kinross* (the latter of the Scottish Bar), appeared for the respondents, but were not called upon.

The House took time for consideration.

1911. Dec. 14. LORD ATKINSON. My Lords, this is an appeal from a judgment of the First Division of the Court of Session, as the Court of Exchequer in Scotland, pronounced upon a case stated under the Taxes Management Act, 1880, by the General Commissioners of Income Tax for the county of Edinburgh at the request of the respondents. The respondents were assessed to income tax under the Income Tax Acts for the year ending April 5, 1909, on the sum of 2404*l.*, in respect of the alleged profits of their business carried on by them.

This sum of 2404*l.* was claimed by the appellant to be the average annual profit made by the respondents from the date of their incorporation on July 27, 1905, during two and a quarter years succeeding. In arriving at the sum of 2404*l.* no deduction was allowed in respect of two sums of 80*l.* 5*s.* 4*d.* paid during the period of trading up to October 31, 1906, nor of the sum of 4576*l.* 13*s.* 4*d.* paid during the year ending October 31, 1907, as interest to bankers of the company in America on loans made by them to the company.

The respondent company carries on an investment business. It has under its memorandum of association power to deal in investments and securities of all classes, and has also power to borrow and raise sums of money by way of loan, discount, cash, credit, overdraft, &c., and, further, to grant security for any sums of money so borrowed.

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(1) (1891) 29 S. L. R. 134; 3 Tax Cases, 149.

Its course of business during the years for which its alleged profits and gains are assessed is set forth in paragraph 4 of the case stated as follows: "4. In the course of its business the company purchased in New York certain bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the company's available cash, and certain of the securities which were lying in New York were pledged to Messrs. Ladenburg, Thalmann & Co., the company's bankers in New York, in consideration of which the bankers allowed the company's bank account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the company bought and sold securities, and the company was charged periodic interest at current rates from day to day. In September, 1906, Messrs. Ladenburg, Thalmann & Co. opened a loan account, in addition to the ordinary overdraft with the company in New York, on which they granted a loan not exceeding $200,000 to the company for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated, and the balance was transferred to current account. Messrs. Ladenburg, Thalmann & Co. collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the company. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month, the interest was debited to the overdraft on the current account."

It will be observed that the loan was not a loan of $200,000, but a loan up to $200,000. The sum lent, in fact, might fluctuate from day to day or week to week, from cipher up to this limit. The interest payable in respect of the sum lent was not annual interest or an annuity or annual sum payable out of profits and gains within the meaning of r. 4, s. 100, of the Income Tax Act of 1842, no more than was the interest paid on the periodical overdrafts fluctuating in amount. That is obvious. In *Goslings* v. *Blake* (1) it had already been decided by Lord Esher M.R., Lindley and Bowen L.JJ., in the Court of Appeal,

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(1) (1889) 23 Q. B. D. 324.

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that interest upon a loan by a banker to a customer for a period of less than a year did not fall within the words "any yearly interest of money or any annuity or other annual payment" occurring in 16 & 17 Vict. c. 34, s. 40. These words are practically identical with the words of r. 4. I am, therefore, at a loss to understand what possible application the decision in the case of *Alexandria Water Co.* v. *Musgrave* (1), so much relied upon in argument on behalf of the appellant, has to the present case, inasmuch as the question decided in that case was whether the interest payable every half-year on such a permanent security as the debentures of the company fell within the words of r. 4.

The appellant, indeed, does not seek to ground on that rule this wholly unprecedented attempt of his to exact taxation. He rests it on r. 3, a wholly different rule, on the ground (1.) that the debit balances against the company on their current account, as well as the loans made on the loan account, constitute "sums employed or intended to be employed as capital" in the respondents' trade or business; and (2.) that the interest paid by the respondents to the bank in respect of these loans "comes within the words of the rule as deductions 'for' the sum so employed, as capital."

The case of *Mersey Docks* v. *Lucas* (2) decided that the general principle upon which the "profits and gains" of any trade, manufacture, adventure, or concern are to be ascertained for the purposes of the Income Tax Acts is this: that the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them.

Gresham Life Assurance Society v. *Styles* (3) establishes that if a taxpayer is trading in money, selling life annuities in consideration of a price received for them, either in a lump sum, or by deferred payments, the annuity he sells is precisely in the same position quoad this Act as is the coal sold by a coal merchant, or the corn sold by a corn merchant, and are no more to be treated per se as "profits and gains" of his business than are those material subjects of merchandise to be treated as the

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(1) 11 Q. B. D. 174.
(2) (1883) 8 App. Cas. 891.
(3) [1892] A. C. 309.

"profits and gains" of the business of the merchants who vend them.

The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended; and part of that cost may consist of the sum he pays for the hire of a machine, or the services of persons employed to produce, procure, or sell the article.

The second proposition established in the last-mentioned case is that in these Acts the words "profits and gains" are, where the context does not otherwise require, to be construed in their ordinary signification. I can see no reason for suggesting that this last-mentioned principle should not apply to the word "capital" when used in these statutes, and that it too, where the context does not otherwise require, should be construed in its ordinary sense and meaning. If one takes the case of an ordinary joint stock bank, whose business consists in the daily or hourly borrowing of money from the customer who lodges money with it either on deposit or current account, for which the bank becomes the debtor, or of lending money to those whose bills or notes it discounts, or whose securities it takes in pledge, and daily, almost hourly, repaying in driblets, by the cashing of the lenders' cheques, the amount borrowed, then, according to the argument of the Attorney-General, the amount borrowed, fluctuating day by day, if not hour by hour, is to be treated as *capital* employed in the trade, adventure, or concern of the bank, within the meaning of r. 3, s. 100, of the Income Tax Act of 1842. No reduction, moreover, is to be made in respect of the sums lent by the bank on the discount side of its business. Indeed the Attorney-General, as I understood, admitted, as he was by the necessities of his argument obliged to admit, that the result would be the same in the case of a joint stock bank which by its charter or articles of association was absolutely prohibited from increasing its capital; that, it appears to me, simply amounts to this, that the word "capital" must, in this rule, be held to bear a wholly artificial meaning, differing altogether from its ordinary meaning, though there be no context in the clause requiring that there should be given to it a meaning different from that which it bears in ordinary commercial transactions. In *Bryon* v. *Metropolitan Saloon Omnibus Co., Ld.* (1) it was held that the borrowing of money for the purposes of the business of the defendants, a carrying company, was a mode of conducting their business within the meaning of the 33rd and 34th sections of the Joint Stock Companies Act of 1856; and the decision has been treated as having also determined that the borrowing by such a company of money by the issue of debentures does not amount to an increasing of the *capital* of the company. In *General Auction Estate and Monetary Co.* v. *Smith* (2) the plaintiff company was established for the purchase and sale of estates and property. It granted advances on estates, on property intended for sale, loans on deposits of securities, discounted approved commercial bills, and received money on deposit; so that its business resembled to some extent that of the company in the present case. Under its memorandum and articles of association it had no express power to borrow money; but it was held that being a trading company it had, as such, implied power to borrow money for the purposes of its business. At p. 441 of the report Stirling L.J. dealt with the former of these authorities thus: he says, "Now upon that it seems to me that the case of *Bryon* v. *Metropolitan Saloon Omnibus Co.* (1) is a direct authority, because what was there done by the company was to raise money on debenture for the purpose of more effectually carrying on the business of the company, and that this is so is shewn, I think, by the remarks of Lord Justice Lindley on that very case in Lindley on Companies" (5th ed., p. 191; 6th ed., p. 290). "He says, after discussing the subject of borrowing by companies, 'Connected with the subject of borrowing money is increasing capital. The difference between them is illustrated by *Bryon* v. *Metropolitan Saloon Omnibus Co.* (1) In that case the capital of a limited joint stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the

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(1) (1858) 3 De G. & J. 123.

(2) [1891] 3 Ch. 432.

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capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied upon had no application to the case; the capital of the company being one thing and that which was sought to be increased by borrowing, namely the cash in hand, being a different thing.' "

These authorities shew that money borrowed by such a company as the respondent company in this case in the fluctuating temporary manner in which it has been borrowed by them,—the daily borrowing and lending of money being part of their trade and business,—is not to be treated under the Joint Stock Companies Act as "capital." There is nothing to shew that that word should bear a different meaning in the Income Tax Acts when applied to the proceedings of joint stock companies. The interest is, in truth, money paid for the use or hire of an instrument of their trade, as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the company procures the use of the thing by which it makes a profit, and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which the company earns. Were it otherwise they might be taxed on assumed profits when, in fact, they made a loss.

It only remains to refer to the case of *Anglo-Continental Guano Works* v. *Bell* (1), so much relied upon in argument in the Court of Session and before your Lordships. On close examination of this supposed authority it will, I think, be found that it does not apply to the present case so directly as seems to have been assumed. In that case a German company incorporated under the German law, carrying on the business of importers and manufacturers of guano, had its head office in Hamburg and branches in London and elsewhere. The London house was carried on as a separate business, with a separate capital, and conducted the whole of the company's business in the United Kingdom. Sometimes the London house purchased cargoes of guano direct, and in order to pay for them got advances (1.) from the head office, and (2.) from bankers abroad, sometimes directly,

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(1) 70 L. T. 670; 3 Tax Cases, 239.

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but usually through the central office. What was decided in the case was that the sum paid for interest on these loans could not be deducted under r. 3, on the ground that the money borrowed was employed as capital, and that this interest was a sum deducted "for" this capital; but the case was treated as if it were a case between partners engaged in a partnership business, one or all of whom is or are trading with borrowed capital.

Mathew J., as he then was, says (1) "It appears to me clear when you look at the language of the Act that what are intended to be assessed are the profits of the particular business, and that those profits are to be ascertained in the ordinary way without reference to whether or not a particular partner or all the partners are trading with borrowed capital." And further on (2) he says: "It is perfectly clear that in the hands of partners deductions of that class and character are not to be made because if made, you would not be ascertaining what really are the profits, not of the partners, but of the business." Precisely so. When each of the different members of a firm brings a certain sum of money into partnership, the thing which concerns the firm as a trading entity is the amount brought in, not what it cost each of the contributing members to procure what he brings in. That is a matter as unconnected with the business of the firm as a trading body, whose profits as such are to be ascertained, as is the loss a particular partner might sustain on the sale of the securities he might be obliged to dispose of to procure the money he brings into partnership. Cave J. deals with the matter in the same way. He says (3): "It seems to me that that is not so—that the gains of the trade are independent of the question of how the capital money is found, that the gains of the trade are those which are made by legitimate trading after paying the necessary expenses, which you have necessarily to incur in order to get the profits; and that you cannot for that purpose take into consideration the fact that the firm or trader has to borrow some portion of the money which is employed in the business." It does not appear to me that the reasoning on which this decision is based can apply to a bank whose business is the

(1) 3 Tax Cases, at p. 244.

(2) Ibid. at p. 245.

(3) Ibid. at p. 245.

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borrowing and lending of money, or to an investment company whose business is conducted as is that of the respondents in the present case. If it does apply, then I can only say I think it unsound as so applied, and am unable to concur in it. Moreover, the decision is not binding on your Lordships' House.

Mr. Atkin, though not called on, pointed out that the words of the rule are "no sum shall be deducted *for* any sum employed or intended to be employed as capital," and would have argued, I presume, that these words could not apply to *interest* paid by a trading company for the use of money borrowed for the purposes of their trade. It is not necessary to decide the point. He may be right, but I prefer to rest my judgment on the broader ground. On the whole, therefore, I am of opinion that the decision appealed against was right and should be affirmed, and the appeal be dismissed with costs.

LORD GORELL. My Lords, I have had the opportunity of reading and considering the judgment of my noble and learned friend which has just been read by him, and I fully concur in it.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

EARL LOREBURN L.C. My Lords, I agree.

Ordered that the appeal be dismissed with costs.

Lords' Journals, December 14, 1911.

Agent for appellant: *Sir Francis C. Gore, Solicitor for England of the Board of Inland Revenue, for Sir Philip J. Hamilton Grierson, Solicitor for Scotland of the Board of Inland Revenue.*

Agents for respondents: *Linklater & Co., for Guild & Shepherd, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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CRAWFORD & LAW . . . . APPELLANTS;

AND

ALLAN LINE STEAMSHIP COMPANY, LIMITED . . . . RESPONDENTS.

Shipping—Through Bill of Lading—Transit partly by Land and partly by Sea—Duty of Shipowner to notify Inland Carrier of Damage to Goods.

In an action for damage to flour carried in the defenders' steamship from New York to Glasgow, it appeared that the flour was despatched under a through bill of lading from Minneapolis to Glasgow via New York, signed by an agent "on behalf of carriers severally and not jointly," and stating that the goods had been received at Minneapolis "in apparent good order except as noted." This bill of lading was subject to conditions dealing with the service up to the port of New York, which provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route nor after the property was ready for delivery to the next carrier or to consignee, and also that claims for loss or damage must be made to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof no carrier should be liable thereunder, and provided that the contract was executed and accomplished and all liability thereunder terminated on the delivery of the property to the steamer, her master, agents, or servants. Another part of the bill of lading dealing with the service after delivery at New York and until delivery at Glasgow provided that the steamer should not be liable for inland damage and should "only be responsible for such part of the goods as had been actually delivered to her at the port" of New York, and should not be liable for any loss or damage that might have occurred before such delivery, and also that the shipment until delivery at Glasgow should be subject to the American statute called the Harter Act. The receipts signed by the defenders' agent and given to the inland carriers stated that 110 bags of flour were damaged by "caking." The flour was contained in over 41,000 bags. The flour after its arrival at Glasgow was found to be damaged by "caking" to the extent of 4132 bags:—

Held, reversing the decision of the Second Division of the Court of Session, 1911 S. C. 791, that the defenders were bound by the statement contained in the bill of lading that the goods were received by them in "apparent good order and condition" save as noted, i.e., save as to 110 bags, and were therefore subject to the onus of proving that the damage, except so far as they had notified the inland carrier, was in fact done before they had possession of the flour; that this onus had not been discharged; and that the defenders were liable.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

The appellants were Messrs. Crawford & Law, a firm of flour importers in Glasgow, who sued on behalf of themselves and also as assignees of other flour importers in this country. The respondents were the Allan Line Steamship Company. The facts are given in the opinions of Lord Atkinson and Lord Gorell.

1911. Nov. 24, 27. *Bailhache, K.C.* (with him *D. P. Fleming*) (the latter of the Scottish Bar), for the appellants. The effect of the through bill of lading is that each carrier is liable only for the damage which occurs on his part of the route. Secondly, that each carrier is bound to notify any damage done to the goods before he received them. There is in fact a limitation of the liability of each carrier. The failure to notify the damage sustained by the goods before delivery to the ship prevents the owners of the goods from preferring any claim against the inland carrier and has the effect of making the defenders responsible. In the absence of such notification the defenders have failed to prove that the goods were not delivered in "good order and condition." The defenders are therefore liable except so far as they notified the damage, i.e., to the extent of 110 bags: Carver's Carriage of Goods by Sea, 4th ed., s. 103a; s. 4 of the Act of Congress of the United States of February 13, 1893, entitled "An Act relating to Navigation of Vessels" (the Harter Act); *Craig & Rose* v. *Delargy*. (2) The limitation of each carrier's liability is "except as noted." In the absence of notification the carrier is bound by the statement that the goods were received in apparent good order and condition.

Morison, K.C., and *C. H. Brown* (both of the Scottish Bar), for the respondents. The construction put by the appellants upon the bill of lading lays an intolerable burden on the shipowner. The defenders are not bound by the statement of the condition of the goods at Minneapolis, for there were many stages on the journey, where the goods were to be taken at owner's risk, and the obligation of the shipowner is discharged if the goods are delivered at Glasgow in the same condition as that in which they were received from the railway company at New York. It may be that the "caking" was caused by the rain; the goods are stated to be "received in rain," and "all more or less stained." Moreover "caking" is not apparent damage when loading at the rate of 500 to 700 bags an hour. The shipowners do not warrant that the cargo shall not be injured by rain. There is no provision in the bill of lading that the shipowner warrants the complete examination of the cargo so as to shew whether it is "caked" or not. The defenders have shewn that they used all the usual precautions to protect the flour from rain, and notified the railway company that so many bags were "stained," "torn," and "dirty," and that is all that could reasonably be required.

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(1) 1911 S. C. 791.

(2) (1879) 6 R. 1269.

D. P. Fleming replied.

The House took time for consideration.

1911. Dec. 19. EARL OF HALSBURY. My Lords, the importance of this case depends not so much on the amount sued for as the effect to be given to what is called a bill of lading, but which goes somewhat beyond what in commercial circles is generally known by that name. It is a written document dealing with the carriage of a cargo of bags of flour to be carried from Minneapolis, in Minnesota, one of the northern States of America, to Glasgow. This transit, involving as it does carriage by railroad, inland lake, and ocean voyage, comprehends the handing over the goods to be carried by several independent carriers. It has been found convenient both to the carriers and to the owners of merchandise to devise this form of what is in some respects a novel form of bill of lading so as to fix the responsibility of each of the successive carriers in turn for any damage or loss of or to the goods so carried under this contract during the period of transit.

The facts may here be very briefly stated. The flour was in 41,000 bags in good order and condition, and was so delivered to the first carriers on the route prescribed to go via New York, and each carrier in turn was to certify by a system of checking the state and condition of the goods carried in handing them over to his successor, and the succeeding carrier was to receive them in like order and condition and to be responsible for himself delivering them to his own successor on the route except so far as they were marked. It is proved that this course was pursued at New York (whether this was accurately done is another matter with which I will deal presently). A somewhat trifling number were marked at New York, but a very serious number—upwards of 4000 bags—were discovered at Glasgow to have been damaged.

Here I may say that it appears to me to be irrelevant to discuss what is the nature of the damage done and whether it may or may not be comprehended in certain other words. In respect of the question as applicable to the parcel of 4000 bags caked the question may be separated entirely from the question of the amount of damages that may be recovered. It is enough to say that there is no doubt that these 4000 and odd bags had been damaged, and the sole question for decision is to my mind upon whom the responsibility for this rests under these bills of lading. The question is one of law, because it does not appear to me that upon the facts stated there is any real dispute between the parties. The question is, as I have described, the validity of this form of bill of lading.

It is proved, as I have said, that the above was the course of business pursued at New York, and whether what I have described as the course of business was done accurately or not at New York does not appear to me (if the bill of lading, as it is called, is valid) to be very material, because, as I think the Lord Ordinary has pointed out, it is quite clear one must assume that each of these carriers in turn receives the goods in good order and condition except so far as notified in the manner which has been described.

The Lord Ordinary decided after proof that the defenders were liable by reason of the contractual engagement by the

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two documents called bills of lading, one signed at Minneapolis and the other at New York, but both signed by authorized agents.

Of course this part of the arrangement was most important since but for it neither carrier nor merchant could fix responsibility for loss or damage, since there is an express stipulation that no one of the independent carriers should be responsible for loss or damage except that occurring on his own part of the line. The contract embodying this obligation amongst others was duly signed by Mr. P. R. Jarvis on behalf of the defenders. The successive obligations and responsibilities of each succeeding carrier are absolutely essential to such a system as is established by the through bill of lading, enforced as it is by the contract, to which all are parties, that none of them shall be held answerable for loss or damage beyond their own line; and I am wholly unable to agree to the passage in Lord Salvesen's judgment in which he says that no bill of lading of any kind was signed by the master or agent of the steamer at New York. Of course the learned judge does not mean that it must have been signed at New York. He has, I think, omitted to notice that the bill of lading, which is given to us as a specimen of all the bills of lading, was signed by Mr. P. R. Jarvis expressly on behalf of the steamer which was to carry the flour from New York to Glasgow—that is on behalf of the defenders themselves. The learned judge appears not to have noticed this fact, yet upon it the whole question turns. If this bill of lading is valid according to its true construction, I do not think it is necessary to go into the question of the incorporation of the contract, because the bill of lading describes with considerable accuracy what is to be done, and what is to be assumed if no such marks as are indicated are found upon the bags on their arrival. This has been done. It appears to me that the judgment of the Lord Ordinary is perfectly right and ought to be restored.

LORD ATKINSON. My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session pronounced on March 17, 1911, recalling an interlocutor of the Lord Ordinary dated December 23, 1909.

The action in which this last-mentioned interlocutor was pronounced was raised to recover damages alleged to amount to 167*l*. 12*s*. 6*d*. for injury done to 4132 bags of flour less 110 bags, portion of a cargo of 41,110 bags loaded at New York on December 19, 1903, and following days, on the respondents' steamship *Corinthian*, and carried by her for freight to the port of Glasgow, and there delivered to the consignees, the appellants, on January 11, 1904, and the days following.

It is not disputed by the respondents that these 4132 bags of flour were, when delivered in Glasgow, "caked." Caking is the damage complained of, and consists in this, that the texture of the bag getting wet, the wet got through the bag and wetted portion of the flour immediately contiguous to its inner surface, turning the flour into dough, which, when dry, hardened and became what is called a cake. It is admitted on both sides that this caking does not injure the uncaked portion of the flour contained in the bag. And it is further admitted that the caking in this case resulted from the bags having been wetted by fresh water, and that this wetting did not take place in the hold of the steamer *Corinthian*, though, of course, the caking might, and almost certainly would, take place there if the bags were wet when placed in the hold. It is admitted further that the bills of lading were not drawn up, delivered, or signed by the master of the ship and that they were not expressly conversant with the ocean voyage from New York to Glasgow. The goods had been purchased from the Pittsburg Wasburn Flour Mills Company, Limited, carrying on business at Minneapolis, Minn., in the United States of America, and were on October 10, 1903, delivered to the Lehigh Valley Transportation Company, consigned to Glasgow to the order of this milling company, to be carried, as the appellants alleged, the entire way to this Scotch port under the terms of certain bills of lading, somewhat peculiar in form, for a through freight. One of these bills of lading is printed as a specimen at p. 374 of the appendix. It is signed P. R. Jarvis, agent, "on behalf of carriers severally but not jointly." And immediately above this signature the following paragraph is to be found:—

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"In witness whereof the agent signing on behalf of the said Lehigh Valley Transportation Company, and of the said Ocean Steamship Company or ocean steamer and her owner severally, and not jointly, hath affirmed two bills of lading, all of this time and date, one of which bills being accomplished, the other to stand void."

The sum sued for is of small amount, but the proper construction of through bills of lading such as this, which are common, and the determination of the rights and obligations of the parties concerned under them, are of vast importance. It is for the purpose of getting these matters finally decided that this litigation was admittedly commenced. The bill of lading contains on the face of it a statement that the flour was received "in apparent good order except as noted." The provision immediately following is to the effect that the goods so received "are to be carried to the port of New York, and thence by Allan State Line to the port of Glasgow, Scotland . . . . and to be there delivered in like good order and condition as above consigned, or to the consignee's assigns," &c. It then proceeds to provide that, in consideration of the freight named, the service stipulated for is to be performed thereunder subject to the conditions, whether printed or written, contained in it. Then follow eleven conditions dealing with the service up to the port of New York.

It is only necessary to refer to three of these, namely, No. 1, providing that no carrier shall be liable for loss or damage caused, amongst other things, by "heat, frost, wet, or decay" No. 3, providing that "no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after the property is ready for delivery to the next carrier or to the consignee . . . ." and further that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if same be delayed for more than thirty days after delivery, or after due notice of readiness to deliver, no carrier should be liable thereunder; and No. 11, providing that the contract is deemed to be executed and accomplished and all liability thereunder to terminate on the delivery of the property to the steamer, her master, agent, or servants, or to the steamship company, and that the inland freight and charges should be a first lien due and payable by the steamship company.

The second part of the bill of lading deals with the service after delivery at New York, and until delivery at Glasgow. It contains nineteen separate paragraphs. Of these No. 1 provides, amongst other things, that the steamer should not be liable for inland damage, and No. 11 that the steamer should only be responsible for such part of the goods as are actually delivered to her at the port of New York, and should not be liable for any loss or damage that might have occurred before such delivery, "while agreeing to promptly present to inland carriers for account of owners of goods any claim for shortage, or loss, or damage that may have occurred before delivery of goods at the port" of New York.

It is, I think, plain that by these provisions for the prompt delivery of claims for damage, contained in paragraph 3 (dealing with inland carriage), and in paragraph 11 (dealing with ocean carriage), it was designed to set up machinery to protect on the one hand each carrier from claims for damages not occurring on his portion of the through route, and to secure on the other hand to the owner of the goods the means of enforcing any claim he might have against the carrier on whose portion of the through route his goods were, in fact, lost or damaged. The shippers contracted with the transport company to carry these goods in the way and by the means stipulated for to their destination at Glasgow. The shippers were neither bound nor entitled to interfere with the cargo en route, and if, on the arrival of the goods at Glasgow in a damaged condition, the consignees were left to discover for themselves on what part of the route the damage was caused, they would be absolutely at the mercy of the carriers. It suits the interest of these carriers to carry goods in this way for through freights; but, if they adopt that method of doing business for their own gain, it is but reasonable that, if they wish to escape liability themselves, they should be bound by noting the condition of the goods when received by them to protect the interest of their customers, the shippers.

The second part of the bill of lading contains two other important provisions; first, by section 2, it provides that the shipment until delivery at Glasgow is to be subject to all the provisions of the American statute of 1893, called the Harter Act.—By s. 4 of that Act, the owner, master, or agent of every vessel transporting goods from an American port to any foreign port is bound to issue to the shippers a bill of lading containing, amongst other things, a statement of the apparent order and condition of the property delivered when received by the owner, master, or agent of the vessel for transportation, which document is thereby made prima facie evidence of the receipt of the merchandise described in it;—and, secondly, paragraph 18 contains a provision to the effect that the property covered by the bill of lading is to be subject to all the conditions expresssd in the regular forms of bill of lading in use at the time by the steamship company. One of these so-called ocean bills of lading is printed on pp. 383 and 384 of the appendix. It commences with the statement "Received in apparent good order and condition by the Allan State Line from the . . . . to be transported by the good British ship *Corinthian* . . . . to be delivered" in like order and condition at the port of Glasgow.

Unless, therefore, the respondents violated the American law, the bill of lading so signed by Jarvis must be taken to be a bill of lading issued by them for the ocean voyage, and Jarvis must be taken to be their agent for that purpose.

I am quite unable, therefore, to follow the reasoning of Lord Salvesen when he says, as he is reported at p. 445 of the appendix, to have said, that the admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis. That condition is that the goods are to be taken to be in apparent good order and condition except as notified. It is more restricted than what is required by the Harter Act or by the ocean bill of lading. Neither can I follow his reasoning where, at pp. 447 and 448, he says: "It would, of course, have been different if there had been a bill of lading signed on behalf of the ship acknowledging receipt of the flour in good order and undertaking to deliver it in the same order, for this would have been a contractual obligation which it

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would lie on the ship to excuse itself from discharging. Here, as I hold, there is nothing of the kind." But what are the facts? The flour arrived at New York in due course. It was there warehoused. On November 12, 1903, H. C. Davis, the foreign freight agent of the Lehigh Valley Railway, wrote to Austen, Baldwin & Co., the agents of the respondents, to notify them of the arrival of flour "engaged with you for Glasgow," and asking for a shipping permit. The only way in which the flour was "engaged" with the respondents for Glasgow was under the through bill of lading. On December 12 these same agents of the respondents sent a permit authorizing the receiving clerk of the *Corinthian* to receive this flour from the Lehigh Valley Company.

That is followed by the delivery of the goods to the steamer on the 19th and subsequent days of December, 1903, in presence of the respondents' officials, their receiving clerk, L. L. Le Furge, having been sent there for the purpose of checking the delivery and giving receipts for it. He gave receipts, on a printed form, I presume, headed "Received for shipment on board steamship *Corinthian*, bound to Glasgow, subject to the exceptions and restrictions of liability contained in the usual bills of lading of the company." But these latter are the bills of lading incorporated into the through bill of lading by paragraph 18 of the latter. It would, therefore, appear to me impossible not to hold that, whether Jarvis, when he signed the general bill of lading, purporting to act as agent for the respondents, amongst others, had antecedent authority from them so to do or not, they have adopted, acted upon, and taken the benefit of the contract of carriage he purported to enter into on their behalf, and can no more be permitted now to disclaim any liability it may by its terms impose upon them, than if they had placed the seal of the company under Jarvis's signature on October 10, 1903.

Neither can I concur in the suggestion of Lord Salvesen, found at p. 488 of the appendix, that the inland carrier who tendered this flour to the ship was, as regards the loading, the agent of the original shipper, and that accordingly the consent of this carrier to have the goods loaded in rain binds the appellants. I think Mr. Bailhache is quite right in his contention that the shippers had contracted with the first carrier to transport and deliver these goods to the steamship, just as the steamship had contracted to receive them when delivered, that the relation between the shippers and the inland carrier was the contractual relation thereby created, and that the carrier was no more the agent of the shippers to see to the proper delivery of the goods than was the steamship company their agent to see to the proper reception and stowage of them.

It is not suggested that this flour got wet in the warehouse. If it did it must have been caked when delivered, and this should have been readily detected. It is admitted it must have got wet before it was placed in the hold of the steamer, though the caking might, and possibly did, take place there. I concur with the Lord Ordinary in thinking that the respondents have failed to prove that these bags of flour had either caked before they came into their custody or got so wetted before they came into their custody that, as a necessary consequence, they caked afterwards. If anything of that kind occurred the evidence, I think, shews that it could have been readily detected in the process of loading, and if detected it should have been notified so as to preserve the appellants' remedy against the wrong-doer. It has not been notified, and, that being so, I think the respondents are bound by the statement contained on the face of the bill of lading, that the flour was received in good order and condition save as noted, i.e., save as to the 110 bags which were noted and are not included in those for which damages are claimed. I think the interlocutor appealed against was, therefore, erroneous, that that of the Lord Ordinary was right and should be restored, and this appeal allowed.

LORD GORELL. My Lords, the appellants in this case claim for damage to certain sacks or bags of flour carried on the respondents' steamship *Corinthian* from New York to Glasgow. The Lord Ordinary found that the respondents were liable to the appellants in respect of 4022 bags "caked" (being the difference between 110 and 4132), but the Second Division recalled the interlocutor of the Lord Ordinary, and assoilzied the respondents from the conclusions of the action.

The summons in the action was as far back as May, 1904, and the amount in dispute is not large, but the Lord Ordinary states that the object of the action was to stop the loading of flour at New York in wet weather.

The flour was despatched under through bills of lading from Minneapolis for Glasgow. It is admitted that the sacks or bags of flour when delivered to the inland carriers were in apparent good condition (minute of admissions, appendix, p. 413). According to the bills of lading, a copy of a specimen of which is at p. 374 of the appendix, the goods were stated to be received at Minneapolis "in apparent good order (except as noted), contents and condition of contents of package unknown," to be carried to New York and thence by the Allan State Line to Glasgow, and there delivered in like good order and condition. The conditions in the bills of lading were divided into two parts. The first dealt with the service by the inland carriers, the Lehigh Valley Transportation Company, to the port of New York, which terminated with delivery to the steamer (clause 11). The delivery in this case was from the inland carriers' lighters when the sacks or bags were placed in the steamer's slings to be hoisted on board the steamer.

The second part dealt with the service after delivery to the steamer until delivery at Glasgow. By condition 1 of the second part the steamer was not liable for inland damage, and by condition 2 of that part the shipment was subject to all the terms, provisions, and exemptions in what is known as the Harter Act —an Act of the United States in 1893. By condition 11 of the same part the steamer was only responsible for such part of the goods as were actually delivered to her at New York and not liable for any loss or damage that might have occurred before such delivery, "while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port first above mentioned," i.e., at New York. Condition 18 of the said second part provided "That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein."

The through bill of lading was signed by an agent on behalf of the carriers severally, but not jointly.

The receipts given by the respondents at New York to the inland carriers were headed "Received for shipment on board steamship *Corinthian* bound to Glasgow subject to the exceptions and restrictions of liability contained in the usual bills of lading of the company." I understand that these receipts notified that twenty-six sacks or bags were "caked" and that eighty-four were wet, but on delivery at Glasgow it was found that 4132 were "caked." "Caking" appears to be a well-recognized form of damage to flour resulting from wet; a layer next the covering becomes hard, and the covering seems to be firm and hard to the touch. It is not disputed that the caking in question was caused by fresh water. Caked flour requires reconditioning, and the expense of this process to 4022 sacks or bags (the difference between 4132 bags found caked at Glasgow and the said 110 notified at New York as wet or caked), 167*l.* 12*s.* 6*d.*, is claimed in this action.

The Harter Act, which will be found conveniently given in the late Judge Carver's work on Carriage by Sea, section 103, requires the giving of an ocean bill of lading, or shipping document, in case of goods carried out of the United States by sea, and such bill of lading must state, inter alia, "the apparent order and condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described."

The through bill of lading in question in effect incorporates by clause 18 of the second part the respondents' form of ocean bill of lading which is given in the appendix, p. 383, and commences, "Received in apparent good order and condition," and provides for delivery "from ship's dock, where the shipowner's responsibility shall cease, in like order and condition at the port of Glasgow," and also incorporates the Harter Act.

In my opinion the effect of these documents is to charge the respondents with the receipt of the flour in apparent good order and condition, except so far as they notify the inland carrier that this is not the case. Here they notified 110 sacks or bags as caked or wet. There were also notifications in respect of other matters not material to the case. Thus the appellants have an admission that the goods were received by the respondents in apparent good order and condition, except to the extent of 110 sacks or bags, and except as to other matters not material. And I think it would be for the respondents, if they could, to shew that the damage complained of was in fact done before they received the goods. The Lord Ordinary found that they had not discharged the onus of proving this.

During part of the time in which the cargo was loaded, after intimation from the steamship agents that the steamer was ready for cargo, the weather was wet, and precautions appear to have been taken to prevent the goods from being wetted as they were being taken on board from the lighters in which they came alongside it. The Lord Ordinary found that there had not been negligence in the attempts to protect the goods, but it seems reasonably clear that they, in fact, became wetted in the loading, although it is said the loading was stopped when heavy showers or storms came on (appendix, p. 208). If the bags were wet when taken on board the steamer, it would be apparent, and if they were at that time caked, the Lord Ordinary finds that "caking is damage to the contents of the bag indicated by external appearance."

In these cases of through bills of lading the consignors and consignees have no control over the transit, and the convenience of business requires that the shipowner, when he receives from the inland carrier, shall be careful to see what the apparent order and condition of the goods then is. If he accepts them as in apparent good order and condition, he takes the responsibility of delivering them in that order and condition, except so far as it is shewn that the damage complained of was done before he received the goods or was caused by perils excepted in his part of the contract. None were relied on in this case. If they are not in apparent good order and condition he must notify the inland carrier against whom the owner of the goods may claim, subject to any answer that the carrier has. It is said that this imposes a heavy duty on the shipowner, but I do not see that this places him in any worse position than would be the case were he the first receiver of the goods, as in any ordinary case of shipment, from port to port, where, for his own protection, he must be careful not to sign bills of lading for goods as in apparent good order and condition when the goods are not so in fact.

The result is that in this case goods are admitted to have been received by the respondents in apparent good order and condition, to have been discharged in a damaged state, and no sufficient proof is given by the respondents that the damage was in fact done before they had possession of the goods, or by perils excepted after they had such possession.

If it had been established that the damage had in fact been done before the steamer took delivery of the goods, the question would arise as to the duty imposed on the respondents to notify the inland carrier, and I think they would be liable for breach of duty in this respect if they did not make a reasonable and proper inspection in the circumstances and notify the results to the inland carrier by qualifying the receipts accordingly.

The Lord Ordinary finds that the loading of what was a very large cargo was pressed on with the result that the examination which would have disclosed caking was not properly made. It seems to me the evidence shews this. An experienced witness, Mr. Maloney, states that it was about the biggest shipment of flour that he ever saw (appendix, p. 354). The owners were evidently anxious to get the steamer away on her sailing day, and it would seem that they could not do this without going on loading notwithstanding the state of the weather (appendix, p. 282), and that the result was an inadequate and hurried examination. It is not an excuse that the respondents desired to keep to the steamer's sailing date. If the shipowners do not notify they in effect admit that the goods are received by them in apparent good order and condition, and if they wish to protect themselves they must make a proper examination. If they do notify, then the cargo owners must look to the inland carriers so far as the latter are not excused by the terms of their contract.

I am of opinion that the appeal should be allowed and the decision of the Lord Ordinary restored.

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LORD SHAW OF DUNFERMLINE. My Lords, there are two questions in this case. One is a question of law, namely, what is the proper construction of a document called in these proceedings a "through bill of lading"? The other is a question of fact—as to the time and cause of certain damage suffered by a cargo covered by that bill. On both of these questions I agree with all of your Lordships that the conclusions reached by the learned Lord Ordinary (Lord Mackenzie) were correct, and, with the greatest respect to the learned judges of the Second Division, that their judgment, as expressed in the opinion of Lord Salvesen, was erroneous and falls to be recalled.

First. The "through bill of lading" was for the transport of goods from Minneapolis to Glasgow via the Great Lakes. It was most natural that the consignor in such a case should make a contract for the entire journey and know his rights throughout, and most natural that the transporting interests should combine to facilitate such business. Your Lordships have given the details of the document. It was signed by P. R. Jarvis, agent "on behalf of carriers severally, but not jointly," the document stating that the agents signed "on behalf of the said Lehigh Valley Transportation Company and of the said Ocean Steamship Company or ocean steamer and her owner." There are stipulations in it, also perfectly natural, that no carrier is to be liable for loss or damage by causes beyond his control, or not occurring on his own road or his portion of the through route; and it is provided that claims must be made in writing to the agent at the point of delivery promptly after the arrival of the goods, and, if delayed for more than thirty days after delivery, no carrier to be liable.

A special branch of the contract with a special series of provisions applies to the seagoing portion of the route, and the earlier portion just referred to only bears upon this case as illustrating that the provisions of the entire contract point to liability for damage being promptly localized and the damage being paid, the particular carrier being thus ascertained, by that carrier. In the second portion of the contract, into which the form of an ocean bill of lading is imported by reference, it is provided, entirely in accordance with the general scheme of the bargain just mentioned, that the steamer is not liable for loss that may have occurred before delivery to it, while the ocean carrier agrees to present promptly to inland carriers "any claims for shortage or loss or damage that may have occurred before delivery of goods at the port."

In the document as a whole the flour, which was the cargo, was acknowledged as received at Minneapolis in apparent good order, and it is further admitted by the joint minute of parties that each bag and sack of flour when delivered to the inland carrier was in good condition. In the adopted form of ocean bill of lading precisely the same language—"Received in apparent good order and condition"—was used. It is admitted that the Allan Line Company, the respondents, accepted delivery of the goods at New York taking exception to the caked condition of about only a hundred sacks (I proceed upon the concessions as to figures quite properly made in argument), and that when the goods were ready for discharge at Glasgow over 4000 sacks were discovered to be caked.

My Lords, were it not for the judgment of the Second Division, it would be rather difficult to discover what, upon those facts, constitute difficulties in the way of construing this contract. These difficulties, however, in so far as they have led to the reversal of the Lord Ordinary's judgment, appear to be reduced to two. It has been held, to use Lord Salvesen's words, that "the admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis, and the obligation to deliver in the like good order and condition, while it is undertaken by the agent who signs it on behalf of all the carriers severally but not jointly, does not apply in terms to successive carriers." My Lords, I can only say that the very opposite appears to me to be the case. "In the second place, I think," says the same learned judge, "it may well be argued that the inland carrier, by whose servants the flour is tendered for shipment, is the agent for that purpose of the original shipper." It humbly appears to me, my Lords, that this is not the contract of parties. Under a proper construction of this contract the several carriers must, in the view which I entertain, be held bound, unless notification to the contrary is promptly made, to the fact that the goods were received in apparent good order. And

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with regard to the shipowners for the Atlantic voyage, it appears to me, first, that they are expressly bound by the terms of the through bill of lading signed by Jarvis, who was agent for them as well as for the other carriers, that bill of lading stating that the goods were received in apparent good order and condition; while, further, my Lords, it must be borne in mind that, under the law of the United States, such an obligation could not be dispensed with. It would appear to me to be a curious result if, by the device of a through bill of lading, a means of escape could be provided from the general shipping law of the United States.

Once, however, the point of law is settled in the sense that I have indicated, I do not find in Lord Salvesen's opinion that there would be any doubt in the mind of that learned judge as to the legal consequences which would follow. "If there had been a bill of lading, signed on behalf of the ship, acknowledging receipt of the flour in good order, and undertaking to deliver it in the same order . . . . this would have been a contractual obligation which it would lie on the ship to excuse itself from discharging." My Lords, I entirely agree in that view. As, accordingly, I am, along with your Lordships, of opinion that there was such a bill of lading on behalf of the ship in this case, I think the contractual obligation referred to rests upon the respondents. When the judgment of the Inner House is analysed, it is, however, observed that a consideration of the facts and of points as to the onus of proof is made from the opposite point of view, namely, that there was no such contractual obligation, and that the onus under a contract, worded like the present, for through carriage by land, lake, and ocean, rests upon the consignor to prove how the damage was caused and to localize where it occurred. This might be singular as a matter of business; and it appears to me to be out of keeping, not only with the provisions, but with the scheme of the bargain of parties.

Secondly. The construction of the contract being as stated, the determination of the case upon fact is greatly simplified. If there had been no proof whatever, then so standing the contract, the principle of *The Peter der Grosse* (1) would apply. That principle is thus expressed by that very learned judge, Sir Robert Phillimore: "Fairly construed and giving all due weight to the legal effect of the marginal note, the result must be that apparently and so far as met the eye and externally they were placed in good order on board this ship. Well, then, if that be so, if the plaintiffs have shewn by prima facie evidence, that having put these bales and bags in good order on board the ship they were taken out in bad order both externally and internally, I agree with the observation which was made that it is not incumbent on them to shew either how or when the damage was done." I may add, however, that, quite apart from any questions of onus, I could not have seen my way to differ from the view of the evidence taken by Lord Mackenzie. It appears to me that the respondents were extremely anxious for business reasons for the speedy loading of the *Corinthian* with this exceptionally large cargo of flour, and that they took weather risks, they, however, having the complete option on the documents, under "the condition that such cargo can, in the judgment of the steamer's agent (having regard to weather and other circumstances) be put on board the steamer in proper time." I do not follow the reasoning as to the weather not being exceptionally rainy for New York, or the introduction into this case of the custom of the port. If it had been necessary to fix time and cause for the damage to this cargo of flour, I think it to be fairly established that the appellants have done so, and that the responsibility rests with the shipowners.

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(1) (1875) 1 P. D. 414, at p. 420.

I humbly agree in the course proposed.

Ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Courts below.

Lords' Journals, December 19, 1911.

Agents for appellants: *Woodhouse & Davidson, for Gill & Pringle, W.S., Edinburgh, and James Ness & Son, Writers, Glasgow.*

Agents for respondents: *Pritchard & Sons, for Wilson, Caldwell & Tait, Glasgow, and Webster, Will & Co., Edinburgh.*

[HOUSE OF LORDS.]

BUTLER (or BLACK) and Another . . . Appellants; H. L. (Sc.) 1911 Dec. 19.

AND

FIFE COAL COMPANY, LIMITED . . . Respondents.

Employer and Workman—Negligence—Management of Coal Mine—Statutory Duty—Common Employment—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 49—*General Rules* 4 (1.), 7; *Special Rule* 37.

The husband of the pursuer was killed by an outbreak of poisonous gas while working in the employment of the defenders, a limited company, in a coal mine of which they were owners. In an action for damages at common law and alternatively under the Employers' Liability Act, 1880, the sheriff-substitute found that the defenders were liable inasmuch as they had failed to appoint officials competent for the working of the mine, and he assessed the damages at 400*l*. On appeal the Court of Session held that the defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualifications and experience; that although there had been a breach of the special rules applicable to the mine under s. 49 of the Coal Mines Regulation Act, 1887, these rules prescribed the duties of the managers and firemen and imposed no duties directly on the owners of the mine; but, secondly, that the defenders were liable under the Employers' Liability Act, 1880, in respect of the negligence of their servants and their failure to comply with the rules in question, and the Court awarded as damages 282*l*.:—

Held, reversing the decision of the Second Division of the Court of Session, that there was a duty on the defenders as owners of the mine to appoint and keep in charge persons competent to deal with the dangers arising in the mine; that they had not discharged this duty, and were therefore liable at common law for the sum awarded by the sheriff-substitute.

Appeal against an interlocutor of the Second Division of the Court of Session, Scotland. (1)

The facts are given fully in the opinions of the Law Peers.

The appeal was first argued on March 8 and 10, 1910.

Morison, K.C., and *Mair* (both of the Scottish Bar), for the appellants. The decision of the Second Division of the Court of Session was based upon an erroneous view of the law. The

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(1) 1909 S. C. 152. See note on p. 185, post.

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Court held that there had been a breach of certain of the general and special rules applicable to the pit. These were general rule 4 (1.), which provides for an inspection of the mine before the miners go to work; general rule 7, which provides for a withdrawal of the men from a part of the mine which has become dangerous; and special rule 37, which provides for a written record being kept of the presence of noxious gases: Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 49, 50, 51. These rules, of which a breach has been committed, are rules which by the force of the statute impose an absolute duty on the mine owner and make him liable in damages for injury which has been occasioned by a breach of this duty. It is no defence to an action for breach of this absolute duty for the mine owner to allege that he delegated the duties imposed by the rules to certain of his servants and that therefore he is absolved from liability by the doctrine of common employment. That doctrine is not applicable when injury has been caused by breach of an unqualified duty imposed by statute on the master for the men's protection or on those employed by him. If the mine had belonged to an individual who managed it himself and was wholly ignorant of the dangers incident to these gas-bearing seams he would have been liable at common law and his plea of ignorance would have been of no avail, the statute having required imperatively that he should provide his workmen with the necessary protection. The doctrine of common employment is that the risk of negligence on the part of a fellow workman is one of the risks accepted by a workman as an implied term of the contract of service. But the risk involved in an employer's failure to discharge a statutory duty absolutely imperative on him is not a risk which the workman must be presumed to have accepted.

In *David* v. *Britannic Merthyr Coal Co.*(1) Fletcher Moulton L.J. said: "It is settled law that when damage has accrued to any person through the breach of a statutory duty by another person the latter is liable." In *Bett* v. *Dalmeny Oil Co.* (2) Lord M'Laren said: "The duty of supporting the roof is a statutory duty . . . . The duty is not merely to supply a competent underground manager and supply him with material. The statutory duty of the mine owner is to give the necessary support to the roof, and it is not an answer to a case of neglect of duty to say that the employer had delegated the performance of the duty to a competent person." See also A. L. Smith L.J. in *Groves* v. *Lord Wimborne.* (1)

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(1) [1909] 2 K. B. 146, 157.

(2) (1905) 7 F. 787, 790.

The Court of Session made a distinction between rules which impose duties which are commonly delegated to servants and rules which impose duties to be performed directly by the owner, and they decided that the rules broken in the present case imposed duties only on the officials of the pit. That distinction is not well founded. Sect. 50 and s. 51, sub-s. 3, of the Coal Mines Act expressly make the owner of the mines liable for breach of rules, no matter what the rule, and no matter by whom the breach is committed. Nor was this distinction raised in the cases above cited.

R. S. Horne, K.C. (of the Scottish Bar), and *Harold W. Beveridge*, for the respondents. The law applicable to cases of this kind is considered by Lord Cairns L.C. in *Wilson* v. *Merry & Cunningham* (2), citing *Bartonshill Coal Co.* v. *Reid.* (3) The only duty which at common law is laid upon a mine owner "in the event of his not personally superintending and directing the work is to select proper and competent persons to do so." He does not warrant the competency of his servants. Until recently it has never been suggested that the breach of these statutory rules got rid of the plea of common employment: see *Sneddon* v. *Mossend Iron Co.* (4); *Stewart* v. *Coltness Iron Co.* (5); *Macdonald* v. *Udston Coal Co.* (6); *McMullen* v. *Newhouse Coal Co.* (7); *Howells* v. *Landore Steel Co.* (8); *Senior* v. *Ward.* (9)

Rule 7 applies to the manager alone, and if there are poisonous gases in the pit it is his duty to withdraw the men. The manager is the person who must act, and therefore there

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(1) [1898] 2 Q. B. 402, 410, quoted post, p. 174.

(2) (1868) L. R. 1 H. L. (Sc.) 326, 331, 332.

(3) (1856) 3 Macq. 266, 282, 284.

(4) (1876) 3 R. 868, 872.

(5) (1877) 4 R. 952, 954.

(6) (1896) 23 R. 504, 506.

(7) (1896) 23 R. 759.

(8) (1874) L. R. 10 Q. B. 62.

(9) (1859) 28 L. J. (Q.B.) 139.

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was no obligation on the owner. There is no doubt that where a duty is specifically laid on the owner he cannot delegate it, but rule 7 does not impose a duty on the owner. The defenders admitted liability under the Employers' Liability Act, and the only question is, whether there was a common law liability to pay damages. The defenders contend there was not.

Morison, K.C., cited in reply *Hardaker* v. *Idle District Council.* (1)

The House took time for consideration.

1910. July 25. The cause was remitted to the Second Division to answer a question of fact. (2)

On July 12, 1911, the Second Division pronounced a second interlocutor stating they had heard parties on the House of Lords remit, and gave eight additional findings. (3)

(1) [1896] 1 Q. B. 335.

(2) See Lord Shaw of Dunfermline's opinion, post, p. 177.

(3) "Edinburgh, 12th July, 1911. The Lords having considered the judgment of the House of Lords dated 25th July, 1910, and heard counsel for the parties, find in fact (1.) That for several years prior to the formation of the connection between No. 1 pit in which work was being carried on down to December, 1905, and No. 11 pit, the ventilating current passed from the said No. 1 pit through a pit known as No. 7 pit, in which men were at work. (2.) That no evil results had followed from the connection between No. 1 pit and No. 7 pit during the whole period above mentioned, and that so long as the stoppings which surrounded the area of the old fire in No. 1 pit were kept in a good state of repair, the air current was of sufficient volume to dilute and render innoxious any poisonous gas formed by the smouldering fire. (3.) That no new or special danger from noxious gases was created by the formation of the said connection between No. 1 pit and No. 11 pit except that any poisonous gas which escaped from the smouldering fire passed through No. 11 pit instead of No. 7 pit, and that the workmen in No. 11 pit instead of those in No. 7 pit were exposed to the risks arising from a sudden outburst of carbon monoxide gas. (4.) That owing to the long wall workings of No. 1 pit it was impossible to seal up the burning area so as to entirely prevent carbon monoxide escaping therefrom; that this was well known to Gray the manager, Hunter the under manager, and Gibbons the fireman, and that they were fully aware of the necessity of repairing leaks in the stoppings round the fire area when these became obvious. (5.) That the presence of carbon monoxide is of very rare occurrence in mines, and that it would be impracticable to

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1911. Nov. 28. *Munro, K.C.*, and *MacRobert* (both of the Scottish Bar), for the appellants. The result of these new findings is that the question put by the House is answered in the negative, that no special precautions were taken when No. 11 pit was linked up with the other pit where there was a seam specially liable to spontaneous combustion, and where gases had previously prevailed. The sheriff-substitute finds that the respondents were guilty of negligence in not appointing people with a knowledge of a danger they should have known might be anticipated. Whether there was negligence or not on the part of the mine owner was a question of law, and the onus was on the respondents to shew that they had employed competent persons to guard against the dangerous gases reaching No. 11 pit. A new state

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engage persons whether as manager, under manager or fireman who had had any experience of it. (6.) That Gray the manager had some theoretical knowledge of the properties of carbon monoxide, but was unaware of the symptoms resulting from poisoning by this gas; that owing to illness he had not been in the pit for a month prior to the accident, although at the time of the accident he was able to take a general supervision above ground; that Gibbons the fireman was ignorant of its characteristics and its effect, but that Hunter the under manager had had personal experience of the gas and its effects, having been involved in the disaster which occurred at defenders' pit at Hill of Beath in 1901 when six men lost their lives through carbon monoxide poisoning, but that he did not in fact discover that carbon monoxide was being carried by the air current into No. 11 pit although he was at the time engaged in repairing or directing the repair of leaks in the stoppings, and was aware that the smoke which he detected was coming from the smouldering area through leaks. (7.) That the connection between No. 1 and No. 11 pits had been made eleven months before the accident. That no evil results had followed and that apart from the possibility of the stoppings and stowing giving way, the defenders had no reason to anticipate any sudden outburst of carbon monoxide gas which the air currents might not be sufficient to dilute so as to render them innoxious. (8.) That it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter, and Gibbons as to the symptoms and dangers of outbursts of carbon monoxide, and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits was made or thereafter, to secure that the knowledge and qualifications of the persons engaged in the supervision and of the fireman were sufficient to enable them to deal with the special danger which might arise from a sudden outbreak of carbon monoxide gas."

of facts had arisen on linking up the pits, and further precautions ought to have been taken by the respondents.

R. S. Horne, K.C., and *Harold W. Beveridge*, for the respondents. This House has no concern with the proof in cases like this : see Lord Watson in *Caird* v. *Sime* (1); *Mackay* v. *Dick & Stevenson* (2); and s. 40, Judicature (Scotland) Act, 1825 (6 Geo. 4, c. 120). The question whether there had been negligence or not was a question of fact, and the Second Division having so found, the matter is finally and conclusively determined. The Second Division say that there was no reason to anticipate danger. That is final, unless the House hold that no reasonable man would come to that conclusion : see Lord Cairns L.C. in *Metropolitan Ry. Co.* v. *Jackson.* (3) Another thing that should be considered was the meagre state of knowledge of this peculiar and unusual kind of gas, and that it was impracticable to employ people who had experience of it.

Munro, K.C., replied.

The House took time for consideration.

1911. Dec. 19. EARL LOREBURN L.C. My Lords, it is not necessary for me to enter in detail on this case. I have had the advantage of reading the opinion or of conferring with my noble and learned friends who will deal with the details and the facts of the case. It is enough to say that upon the findings of fact of the Second Division by which we are bound I consider there was a duty upon the mine owners to appoint and keep in charge persons competent to deal with the dangers arising in this mine, and that they did not discharge this duty, whereby this unfortunate man met with his death.

I therefore think the appeal ought to be allowed.

LORD KINNEAR. My Lords, I address your Lordships at this stage with the permission of my noble and learned friend opposite (Lord Ashbourne).

I have found this a case of difficulty both in itself and because of my respect for the opinions of learned judges from whom I differ.

(1) (1887) 14 R. (H. L.) 37.
(2) (1881) 6 App. Cas. 251.
(3) (1877) 3 App. Cas. 193.

The question is whether the respondents are liable in damages for the death of a workman in their employment in respect of their own fault, or whether death was due to the fault of fellow workmen for whom the employers are not responsible except in terms of the Employers' Liability Act, 1880. The Court below has rejected the first alternative and has found in law that the pursuers, the appellants, have no claim against the defenders, the respondents, at common law, but only under the Employers' Liability Act. This finding in law which your Lordships are asked to review is based upon a series of specific findings in fact which by the statute regulating appeals of this description this House is bound to accept as "finally and conclusively fixing the several facts so specified." The interlocutor appealed against was pronounced by the Second Division of the Court of Session, on reviewing a judgment of the Sheriff Court of Fife proceeding on a proof taken upon a record made up in that Court. The Court of Session had full power to review the sheriff's judgment both in fact and in law, and for that purpose the learned judges were bound to consider the proof and determine the facts for themselves. But their judgment is appealable to this House "only in so far as the same depends on or is affected by matter of law." This House, therefore, as Lord Watson puts it in *Mackay* v. *Dick & Stevenson* (1), "has no concern with the proof led in the sheriff court"; and although a remit may be made to the Court below to pronounce further findings if it can be shewn that there are material questions of fact left undetermined, "that can only be shewn," says Lord Watson, "by a reference to the record and not to the proof." In this case, accordingly, your Lordships, being precluded from looking at the proof, made a remit to the Court of Session in order to obtain their determination of a material question of fact fairly raised upon the pleadings and the opinions of the learned judges, but which had not been explicitly answered in the interlocutor under appeal. We now have their answer, which is perfectly clear and explicit, in the interlocutor of July 12; and the whole determining facts are therefore to be found in the two interlocutors (2) read together.

(1) 6 App. Cas. 251, 272.

(2) See post, p. 185, and ante, p. 152.

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From these interlocutors it appears that the deceased miner was killed by a poisonous gas while working in the defenders' colliery on April 27, 1906. The pit in which he was working, No. 11 pit, was at the time ventilated by an air current brought down the shaft of another pit (No. 1) with which it had been brought into connection in the previous year, and the accident was due to the formation of this connection. No. 1 pit contained a seam called the Lochgelly Splint and Parrot Seam, which according to the finding of the Court is universally recognized to be specially liable to spontaneous combustion, and part of it was on fire in 1901. The fire area had been sealed up, but it was impossible, from the character of the workings, to be sure that the fire was quite extinguished; and in fact it was still smouldering when the connection with No. 11 was made. It appears that an underground fire in this condition may give off a gas called carbon monoxide, which is so poisonous that the presence of a very small quantity of it in the atmosphere will cause death. It is, however, a gas of very rare occurrence in mines; and the learned judges say in their opinions, although it is not expressly so found in the interlocutors, that it is very difficult to detect its presence except by its effect on the system, since it has neither colour, taste, nor smell, and cannot be perceived by the senses. It was an escape of this deadly carbon monoxide gas from No. 1 into No. 11 pit which caused the death of the miner.

These facts being ascertained, the Court had next to inquire whether the death was imputable to the fault of any person or persons employed in the mine; and on this question they found that the gas escaped into No. 11 pit through leaks in the stoppings which surrounded the whole area of the fire in No. 1 pit. I do not understand that the mere existence of leaks is imputed to negligence. But the possibility of their occurrence, and the necessity for repairing them when they occurred, was known to the manager, under-manager, and fireman; and it is found that "John Hunter, the under-manager, and John Gibbons, the fireman, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen or otherwise, to guard against injury to those employed in the pit, until the cause of the haze and smell were discovered and removed"; and further they found that John Gibbons failed to observe the provisions of rule 4 (1.) and rule 7, enacted by s. 49 of the Coal Mines Regulation Act, 1887, and also of special rule 37 passed in terms of the powers conferred by s. 51 of the said Act, and that the said John Hunter failed to observe the provisions of the said rule 7. The grounds in fact and law for these findings are expressed very concisely and forcibly by the Lord Justice Clerk when he says: "Upon the question whether there was conduct on the part of the responsible persons in charge involving liability under the Employers' Liability Act, I have no doubt whatever. I cannot hold that either Hunter, the under-manager, or Gibbons, the fireman, fulfilled their duty of due inspection, or of moving the men out of danger in the circumstances. The account given of the exceptional state of things that was found on the day in question convinces me that there was sufficiently strong ground for not allowing the ordinary work to go on, until it was made clear, by proper means being taken, that there was no danger." I take it that the learned judges thought that the two men in question neglected a duty imposed upon them by the circumstances, independently of special enactment, as well as by the statutory rules cited in the interlocutor. But for the present purpose it is more important to attend to the specific duties imposed by the statute. The general rule 4 (1.) provides for a daily inspection of the mine before the miners go to work; and in particular it prescribes that "a competent person" shall inspect the mine, "and shall ascertain the condition thereof" in certain respects and in particular "so far as the presence of gas . . . . and general safety are concerned," and that a report specifying where noxious or inflammable gas, if any, was found present and what, if any, other source of danger were or was observed shall be recorded without delay in a book to be kept at the mine for the purpose and accessible to the workmen. Rule 7 prescribes that "if at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of inflammable gases prevailing in the mine or that part thereof, or from any cause whatever the mine or that part is dangerous, every workman shall be withdrawn and a competent person appointed for the purpose shall inspect the mine, and make a true report of its condition; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, be re-admitted into the mine or part found dangerous, until the same is stated by the person appointed as aforesaid not to be dangerous." The special rule, No. 37, required the fireman to record without delay, in a book to be kept at the mine for the purpose and accessible to the workmen before commencing work, where noxious or inflammable gas, if any, was found present. For the application of these rules to the case it is proper to add that "the person for the time being in charge of the mine" was Hunter, the under-manager, because the manager was unwell at the time and unable to go down the pit; and that Gibbons, the fireman, was the competent person required to make the daily inspection and to make and record the reports specified in rule No. 1 and the special rule. The learned judges impute to these two persons, therefore, that they failed to observe rules which are perfectly clear and explicit and obviously of the utmost importance for the protection of the workmen. For two days before the accident they had observed the presence in the workings of a peculiar haze or smoke, and at the same time they knew that some of the men had been suffering from headache and sickness. They might not be sufficiently instructed to connect these symptoms with carbon monoxide, but there was evidence enough of the presence of a poisonous gas of some kind to make it their plain duty to keep the men out of the pit until the leakage from No. 1 pit had been discovered and stopped. This plain duty they failed to perform, and the fireman Gibbons failed also to perform the special duty incumbent upon him of recording these things in a book accessible to the workmen and so affording them an opportunity of refusing to go into the working places until the haze had been got rid of.

Now the judgment is not impugned in so far as it imputes to these two men negligence for which the respondents are liable under the Employers' Liability Act; and the grounds on which

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it has been so decided, so far as we are in a position to judge of them, appear to me irresistible. But the question remains whether the judgment is right in so far as it finds that the respondents are liable only under that Act and not otherwise.

This finding in law is based upon two specific findings in fact: (7.) that John Gray, the manager, and the under-manager and the fireman " were possessed of the qualifications and experience usually required of persons holding these offices" ; and (8.) that " there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager and fireman." If this last finding were an exhaustive statement of fact and of fact only, it would be conclusive of the whole case, because your Lordships have no jurisdiction to review the decision of the Court below on matter of fact. But it involves matter of law, because it means that no ground of liability in respect of negligence has been established against the respondents. But negligence is not a ground of liability, unless the person whose conduct is impeached is under a duty of taking care; and whether there is such a duty in particular circumstances, and how far it goes, are questions of law. If a definite duty has been ascertained, a finding that it has been duly performed or neglected is a mere finding in fact which your Lordships will not review. But a finding as to negligence, which implies the existence of a duty without explicitly defining it, is a proposition of mixed fact and law. Your Lordships must therefore disentangle as well as you can the facts from the law in order that you may decide the question which the parties are entitled to bring to this House by way of appeal. In that duty I think there is little difficulty in the present case, because the learned judges have explained very clearly the legal liability which in their view attaches to the respondents. In so far as the eighth finding " depends on or is affected by" the law so expounded it is unquestionably subject to appeal.

The main ground on which the judgment on this point was impugned by the appellants' counsel was that the statute imposes the duties which are found to have been neglected absolutely and directly upon the mine owners; and therefore that they have a good ground of action independently of negligence. I agree that if an absolute duty is imposed upon mine owners by statute they must be liable absolutely to those for whose benefit it is imposed; and that if the things so required to be done are not done, it will be no answer to say that the failure is not owing to any fault or omission of theirs. That such an absolute duty may be imposed by statute I have no doubt whatever, and probably there may be some such duties imposed upon mine owners by the statute in question. But I find no such absolute duty in the statute with reference to the two rules which are said to have been infringed. The table of rules in which they occur is introduced by the general enactment that the following general rules are to be observed, not absolutely and in any event, but "so far as reasonably practicable in every mine." Nor are the two rules in dispute addressed directly to the mine owners. Sect. 49 imposes a variety of obligations upon a variety of persons, some upon managers and inspectors, some upon working colliers, some upon owners, and some upon anybody who goes down into the pit; and the particular rules with which we are concerned are imposed expressly and directly, not upon the owners themselves, but upon the manager in charge for the time being, or upon the person specially appointed by him or the owners for a certain specific purpose. But it is unnecessary to argue whether rules so qualified and so directed import an absolute duty on the respondents or not, because the point is decided by the judgment of this House in *David* v. *Britannic Merthyr Coal Co.*(1) In that case an action was brought by the widow of a miner who had been killed by an explosion in a mine caused by blasting operations conducted in contravention of the statutory rules, and the learned judge by whom the case was tried directed the jury that the duty of the owners in respect of the rules was in the first place to publish them and in the next place to enforce them to the best of their power as rules for the working of the mine, and that if they did so to the best of their power they would not be responsible if one of their servants by a breach of the rules caused damage; and with these directions he left to the jury the questions, first, whether the shot was fired in contravention of the rules, and, secondly, whether the contravention was brought about by the defendants not taking reasonable means to prevent it by enforcing the rules to the best of their power. But with reference to this last question he further directed them that it was the duty of the plaintiffs to give evidence that the mine owners had neglected their duty of enforcing the rules. The jury answered the second question in the negative; and the Court of Appeal by a majority ordered a new trial on various grounds, as to which there was a great diversity of judicial opinion. The judgment was affirmed in this House, but on one ground only, to wit, that the learned judge had misdirected the jury as to the onus of proof. Lord Halsbury pointed out that the Act required certain precautions to be taken, none of which were taken; that this circumstance obviously called for some explanation; and that on the question whether the authorities of the mine had done their duty in taking proper care for the safety of the miners, the burden of proof lay upon the defendants. The noble and learned Earl expresses no disapproval of the charge in so far as it explains the duty of the mine owners, nor does he indicate that the question whether they had not taken all reasonable means to prevent the accident was not a proper one for the jury; for in stating the effect of the misdirection, his Lordship says that although the learned judge left the question to the jury, which I think implies that he left the proper question to the jury, he left it in such a way and with such a direction that it was hardly possible for them to find any other verdict than that which they did find.

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(1) [1909] 2 K. B. 146; [1910] A. C. 74.

It appears to me that by ordering a new trial on these grounds this House has negatived the absolute statutory liability for which the appellants contend. For if each of the rules contained in s. 49 imposes on the mine owners an absolute duty irrespective of negligence, it would have been no answer to say that they had taken all reasonable means to prevent contravention and no question of onus could have arisen. But then the case decides at the same time that although it be not absolute duty there is still a duty cast upon the mine owners in respect of the performance of the statutory rules even when these are to be actually carried out by other persons than the mine owners themselves, and farther, that if an injury be caused by a breach of the rules, the burden of proving that they have done all in their power to prevent such breach lies upon the mine owners themselves. I confess to thinking that the learned counsel for the appellants put their case unnecessarily high when they argued so strenuously for an absolute liability. The judgment of which they complained finds that the respondents are not liable because the accident which caused this miner's death was due to the negligence of persons in their employment. The true question appears to me to be, not whether the statute imposes an absolute duty with reference to each and every one of the specific rules which the 49th section contains, so that in every case of contravention and in all circumstances the owners must be liable for any consequent injury; but the question is whether it imposes such a duty upon the mine owner personally as to preclude him from putting forward the defence of common employment. This is, of course, a perfectly well established exception from the ordinary rule of law which makes a master responsible for his servants, because it is held to be an implied term of the contract of service that the workman takes the risk of injuries arising from the negligence of other servants in the same employment. But that goes no farther than to relieve the master of liability to his servant unless there be negligence on his part in that which he personally undertakes, or is required by statute to do, for the benefit of the servant.

The question which is raised by the judgment, therefore, is whether there was any statutory duty incumbent upon the respondents themselves which will exclude the plea of common employment, notwithstanding that the direct cause of injury has been found to be the negligence of their under-manager and fireman. I think that that question again is decided by the case of *David* v. *Britannic Merthyr Coal Co.* (1) But to apply that decision to the present case it is necessary to see what is the precise statutory duty in which the respondents are said to have failed. The judgment in *David* v. *Britannic Merthyr Coal Co.* (1) does not expound in detail the particular clauses of the Act upon which the question arises; and I cannot express with confidence any opinion of my own as to the exact construction of the 49th and 50th sections, because it is hardly possible to do so without finding oneself at variance with one or other of the very eminent judges who have already given conflicting opinions upon that point. I venture to say, however, that to my mind the preferable way of interpreting the Act is to take these two consecutive clauses together, to consider how they are related to one another, and so to get at the true meaning and intent of the whole enactment.

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(1) [1909] 2 K. B. 146; [1910] A. C. 74.

Now the 49th section, as I have already said, imposes certain specific duties upon particular persons, but it begins with a general imperative enactment that the rules which are thereafter to be stated in detail shall be "observed so far as is reasonably practicable in every mine." I think that is an enactment expressly directed not only to people who are charged with the actual performance of specific duties, but also to the owners who have the ultimate control of the mine. There is nothing in the form of the language to limit its application to particular persons. It is addressed to all whom it may concern; and I think it impossible to suppose that the mine owners are outside the scope of that general enactment. But the particular rules which are covered by it are for the most part addressed not to the owner, but to the working miners and managers underground. For example, I think it out of the question to hold that if a working collier neglects a specific direction as to the use of a safety lamp, or if he is found in particular parts of the mine with lucifer matches in his possession, that is a breach of an absolute duty imposed upon the mine owner. It may be that certain of the other rules of a different character directly affect the mine owner, as was held by the Court of Session in *Bett* v. *Dalmeny Oil Co.* (1) But the two with which we are now concerned are not among these, because mine owners are absolutely debarred by the statute from interfering personally with the management of the mine. They are bound by very stringent regulations to appoint certificated managers and under-managers, whose authority completely displaces their own. It is nothing to the purpose to say that employers, and in particular joint stock companies, must act through their servants; because the point to be

(1) 7 F. 787.

established is that the defence of common employment is excluded by reason of a statutory duty imposed on the employers personally, which they cannot throw over upon their servants. But I think the appellants make that point good when they appeal to the general enactment that the rules shall be observed, because in so far as it is addressed to the mine owners that provision in my opinion imposes upon them a duty to use due care and diligence to secure that the rules shall be obeyed. If this is a duty of diligence, it follows that the mere breach of a rule addressed directly to a servant will not of itself fix the employer with an absolute liability, but on the other hand it follows equally that the occurrence of an accident through a breach of rule, which it was his duty so far as possible to prevent, raises a presumption against him which he is called upon to rebut. If the rules are broken and mischief follows, there is prima facie evidence of failure of duty, and although the employer may have a complete defence if he has done his best, the burden of proving it lies upon him. This involves no departure from the general rule that, where the balance is even as to the existence of negligence, the party who founds upon the negligence of another must prove his cause of action, because the scale is turned when it is proved that an accident has happened which the employer was bound to prevent.

I come to this conclusion upon the 49th section alone, but I am confirmed in my reading of it by the provisions of the 50th section, which make every contravention of or non-compliance with the general rules an offence against the Act punishable by a fine. I agree that the imposition of a penalty as for a statutory offence does not prove that there is also a civil liability. But the 50th section does not define the offence which it makes punishable, otherwise than by reference to the 49th. It assumes that there are duties already created and recognizes that they are incumbent in different ways upon different persons. For it begins by enacting that every person who contravenes any of the general rules shall be guilty of an offence, and that it is as directly applicable to owners and managers as to anybody else; and then it goes on to shew that there is another and different duty imposed upon owners and managers as such, and not upon persons engaged in the daily work of the mine. For it says that in the event of a contravention by any person whomsoever "the owner, agent, and manager shall each be guilty of an offence against the Act unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine to prevent such contravention or non-compliance." I cannot read this last clause as the remission of a penalty which it assumes to be already imposed. It is an essential part of the definition of the offence. If any person whosoever, other than the owner himself, has contravened a rule, the owner has committed no breach of duty and is guilty of no offence, provided he can prove that he has taken all reasonable means to the best of his power to prevent such contravention. If he has not taken such means he is in breach of duty and is therefore guilty of an offence. I do not go to the penalty clause for the purpose of inferring a civil liability. But I think it of material importance to the question of construction because while the duty had been already laid down, it became necessary to determine its scope and extent with more precision, when non-performance was to be made a punishable offence.

If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (1) and by Lord Herschell in *Cowley* v. *Newmarket Local Board* (2) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention.

(1) (1877) 2 Ex. D. 441.

(2) [1892] A. C. 345.

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Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability. I think this has been found both in England and Scotland in cases in which the point was directly raised, the case of *Groves* v. *Lord Wimborne* (1) in England, and *Kelly* v. *Glebe Sugar Refining Co.* in Scotland. (2)

Then, my Lords, if that be so, the only question that remains is whether the duty so imposed upon the mine owner of using all due care and diligence to prevent the contravention of the rules by anybody in the mine, is or is not a duty that precludes him from putting forward the plea of common employment. I think it is very clear it is such a duty. The negligence of the persons in the employment of the respondents is the very cause of liability which the statute creates. They are to do their best in order to prevent persons in their employment from contravening the rules, and it is out of the question to say that it is a good defence to shew that the direct cause of the injury was the negligence of their servants, which is the very thing they were bound to prevent, if they did not do what was in their power to prevent it. But I am afraid I ought not to have detained your Lordships so long by an examination of the statute or its legal consequences, because I say again I think this point, like the former, is directly decided by the case of *David* v. *Britannic Merthyr Coal Co.* (3), for your Lordships in that case held that, when an action had been brought for an injury caused by a contravention of the rules, the question as between the plaintiff and the mine owners was whether the contravention had happened notwithstanding that the mine owner had done all in his power to prevent its happening, and that the burden of proving that he had performed that duty, which was cast upon him for the safety of his workmen, lay upon the mine owner.

My Lords, the only question that remains then is whether upon the findings in fact, which form the only basis upon which your Lordships must apply the law to the particular facts of this case, it is shewn that the respondents have discharged the burden laid upon them by proving that they have performed their duty towards their workmen. I should have thought this very doubtful if it had to be determined by reference to the interlocutor first appealed against, as explained by the opinions delivered in the Court below. It is evident in the first place that the learned judges treated the case as an ordinary action for negligence, in which it was for the pursuers to prove the negligence that they alleged. And, since the injury was due to the fault of fellow servants, the Court held that this could only be done by shewing that the master had failed to use due care and diligence in the selection of competent persons to superintend and carry on the work. That is the meaning of the judgment. This is clearly brought out in the opinion of the Lord Justice Clerk, where he says, "On a consideration of the evidence in this case I am not satisfied that the defenders have been proved to have been negligent in making the appointment." This is not the point of view which the statute requires to be taken. But a difficulty was created by the terms of the interlocutor finding that the defenders were not negligent. It is preceded, as your Lordships are aware, by a finding that the persons whose conduct is impugned as negligent were possessed of the qualifications and experience usually required in persons holding their office. If the succeeding finding, that there was no negligence, meant only that the employers were not negligent in respect that at the time they made the appointments they had satisfied themselves that the qualifications and experience of these two men were those of ordinary under-managers and firemen, who might be without the knowledge or experience which would enable them to detect and guard against danger from carbon monoxide, your Lordships, I think, would have required to consider whether that was not a finding "affected" (to use the phrase of the Judicature Act) by an erroneous view of law. But then there might be quite a different question if the terms of the finding, that there was no negligence in continuing to employ these persons, were intended to mean that when a new danger was brought into existence by the connection of No. 11 pit with No. 1, so as to expose the persons working in the former pit to injury by the escape of poisonous gas from the latter, the respondents had directed their attention to the question of the skill and experience which was required for dealing with the emergency and had continued to employ the men originally appointed because they were then satisfied that they possessed such skill and experience. I apprehend it might very reasonably be said that mine owners, who are themselves precluded from interfering with the working in the mine, could do no more than take due care to see that the people whom they employed were competent and had qualifications adequate to meet the particular danger which they had to consider ; and therefore your Lordships thought it necessary that we should obtain from the Court a more specific statement as to what they held that the respondents had really done in order to satisfy themselves of the competency of the men employed to deal with this particular emergency. Your Lordships have received an answer, and I think it necessarily follows from all I have said that the answer actually given by the Court to this question is conclusive against the respondents, for the answer is that "It would have been practicable"—and I pause to remind your Lordships that under the provisions of s. 49 practicability is the test—"that it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide, and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits was made or thereafter to secure that the knowledge and qualifications of the persons engaged in the supervision, and of the fireman, were sufficient to enable them to deal with the special danger which might arise from a sudden outbreak of carbon monoxide gas."

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(1) [1898] 2 Q. B. 402.

(2) (1893) 20 R. 833.

(3) [1909] 2 K. B. 146; [1910] A. C. 74.

My Lords, I think that is conclusive of the whole question. But then the learned judges in the Court below have thought it necessary or proper to accompany this answer to the question which was put to them by your Lordships by a series of findings in fact which were not before the House when the case was first argued. I think, if I may respectfully say so, the Court was perfectly right in taking this course, because I think it was for them to make it clear to the House what the specific determining facts really were, and if they had omitted from their first interlocutor, for reasons which might be perfectly sufficient in the view which they took of the law, any specific fact which they thought material to the question put to them by this House, it was right and proper that they should now state it and bring it under your Lordships' notice. But then I think the only question which arises upon this specific statement of new facts is whether anything in that statement modifies or detracts from the legal effect of the final statement, that the respondents took no means to secure that the knowledge and qualifications of the persons engaged in supervision were sufficient to enable them to deal with the special danger which arose. This might not have been conclusive if it had been found that no such means were practicable. But the contrary is found in the preceding sentence. I think this amounts to a finding in fact that the respondents failed to perform the duty imposed upon them for the safety of their workmen, inasmuch as they failed to take all reasonable means to the best of their power to prevent the contravention of rules which brought about the accident.

My Lords, I am therefore of opinion, and I so move your Lordships, that the interlocutor appealed from should be reversed. I presume, unless the parties agree as to damages, the case must go back to the Court of Session in order that they may assess damages upon the ordinary rules of common law liability and not upon the limited scale provided by the Employers' Liability Act.

Lord Shaw of Dunfermline. My Lords, on the position of this House, in view of the findings of the Second Division, I agree entirely with the judgment of my noble and learned friend Lord Kinnear. It appears to me that on pure questions of fact the findings must be here accepted as final. But (1.) it is not so in regard to any findings which are findings in law or on mixed fact and law, (2.) nor is it so as to the legal results implied in or following from any findings whether of law or of fact.

The case on its merits and facts is one of such general importance in the mining and industrial world, and has been

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so fully and anxiously presented and considered, that I have thought it right to resume them as follows.

Alexander Hynd Black and a fellow workman, Serrie, both oncost workers in the defenders' No. 11 pit, Lumphinnans, on April 27, 1906, lost their lives in the mine by inhaling carbon monoxide gas. The learned sheriff-substitute Hay Shennan has detailed the circumstances in the first five findings in fact by him, which are adopted in the interlocutor of the Second Division. No one can peruse these without being satisfied that, if it were possible to impute personality and knowledge to a limited company, the defenders must have been well aware that the particular coal measures there being worked were of a specially dangerous character, owing to the occurrence of fires and the escape of noxious and deadly gases. Three men, Gray, the manager, Hunter, the under-manager, and Gibbons, the fireman, were employed at the pit. The Second Division find "(9.) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11 pit, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen or otherwise, to guard against injury to those employed in the pit until the cause of the haze and the smell were discovered and removed." The learned sheriff-substitute in the adopted findings shews that this was not a mere case of withdrawing the workmen, but a case on two, and possibly three, successive days of readmitting workmen to parts of the mine in which the most noxious and dangerous gas, known as carbon monoxide, was apt to operate with fatal effect.

My Lords, it is extremely difficult to understand how, in such a situation, men could be supposed to be competent who had no knowledge of the dangerous properties of the gases in these pits, or of the peril to human life involved in the non-withdrawal or readmission of workmen in the circumstances described. I share to the full, accordingly, the view expressed by the learned Lord Justice Clerk, when he says: "I have found this case to be not unattended with difficulty, particularly in view of the fact that

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the sheriff-substitute, who evidently gave the case great attention, has held that the defenders are liable in damages at common law on the ground that they did not exercise due care in appointing persons of sufficient skill to take charge of the works in their mine." I think it incredible that if men had had such knowledge, without which it is manifest that the lives of those who had to obey their orders were put in hourly peril, they should not have complied with vigour and alacrity to the statutory obligations prescribing imperatively for the withdrawal and non-admission of men from and to the dangerous area.

As the case originally came to your Lordships' House it was a matter for consideration whether the Second Division did find, or did not, that the persons "put in charge of the works" by the respondents knew these essential facts—essential, that is, if the intention of the Legislature to afford those workmen protection from the perils which surround them were to receive anything like attention and effect. Lord Low remarks that it is "proved that the death of the miner, Black, was caused by carbon monoxide having found its way into No. 11 pit along the air passage from the old fire, and that the managers and firemen were not alive to the danger, having had no previous experience of carbon monoxide." What then—this being so—was the actual finding of fact upon which your Lordships' judgment could proceed? It is in these terms: "(7.) That John Gray, the manager, John Hunter, the under-manager, and John Gibbons, the fireman, all at No. 11 pit, were possessed of the qualifications and experience usually required of persons holding these offices." And there followed upon that a mixed finding of law and of fact, namely, "(8.) that there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager and fireman."

My Lords, what did this mean? Did it mean that they knew what do appear to be the essentials of their business in so far as the protection of human life is concerned and so were competent? It seemed to be clear, from the opinions of the learned judges of the Second Division, that their view was that these men did not know these essentials. Or did it mean that they were ignorant thereof, and yet, nevertheless, were competent for their business, because their ignorance was consistent with the possession of the "qualifications and experience usually required"? If so, I find it difficult to figure a finding more hazardous to the pit workers of this country, and more inconsistent with the spirit of those protections which the Legislature thought fit to provide in the Coal Mines Regulation Acts. I may say that I hold it to be not entirely satisfactory that after an express finding of incompetency made with care, and on apparently strong and sound reasons by the sheriff-substitute, the Court of Session should, recalling these findings, simply tender the bare proposition that these men had the qualifications and experience usually required. But further consideration of that proposition, standing by itself, may be foregone in view of the further findings made in answer to the supplementary question remitted by this House on July 25, 1910, to which I shall afterwards refer.

By their tenth finding, the learned judges of the Second Division find "that the said John Gibbons failed to observe the provisions of rules 4 (1.) and 7 enacted by section 49 of the Coal Mines Regulation Act, 1887, and also of special rule 37, passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of the said rule 7." The last finding is "That the pursuers have no claim against the defenders at common law, but only under the Employers' Liability Act."

My Lords, none of the findings of the Second Division deal with what appears to me to be one of the most important rules directly applicable to the present case, namely, r. 1. It is in these terms: "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working places, shall be in a fit state for working and passing therein." That rule is expressly founded upon by the pursuers and appellants, and, indeed, is quoted at length in article 10 of their condescendence in the action.

Rule 1, thus founded on, is the first of a series, following

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words which, so far as they themselves are concerned, are imperative, namely, "The following general rules shall be observed, so far as is reasonably practicable, in every mine." It is admitted that protection in the present case from noxious gases was reasonably practicable, and so the unconditional imperative both of the words of the section and of the specific language of rule 1 remains. This unconditional imperative, dealt with in further passages in my judgment, is, I repeat, one which arises on the assumption that the prescribed protection under the rules was "reasonably practicable."

Rule 1 appears very clearly, indeed, to throw around workmen pursuing the hazardous calling of coal mining these two elementary protections: that the air of the workings shall be fit to breathe and the roads fit to travel without peril.

The question as to roads was tried in Scotland in *Bett* v. *Dalmeny Oil Co.* (1), and another rule (21.), also providing for the same protection, was founded on, namely, "the roof and sides of every travelling road and working place shall be made secure . . . ." A road had not been properly supported while the operation of cutting away certain pillars was being conducted, and this in consequence of the negligence of the manager or oversman. It was strongly contended that, notwithstanding the statutory obligation for safety, the pursuers could not recover under the common law, but that the sole remedy lay under the Employers' Liability Act, the accident having been caused through the fault of the manager or oversman as fellow employees. A verdict was given for the pursuers.

Lord M'Laren delivered the judgment of the First Division, consisting of himself, Lord Adam, and Lord Kinnear. He used these words: "It follows, then, that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now, the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organization of labour of which he is a member, and that the master is only responsible for the

(1) 7 F. 787, 790.

performance of such duties as he can reasonably be supposed to undertake in person—such as the provision of a competent staff of men, adequate material, a proper system, and effective supervision. But in the case under consideration the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager, and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mine owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager."

In *Groves* v. *Lord Wimborne* (1), a case founded upon the neglect to keep machinery properly fenced in accordance with the provisions of the Factory and Workshop Act, the same view on the point of principle was taken, A. L. Smith L.J. remarking: "In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow servant or of any one else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person." The language of Rigby L.J. is, if possible, still more unambiguous. It is in the following terms (2): "There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action. That being so, the doctrine of common employment is out of the question."

When to the dicta of these learned judges there are added those of Fletcher Moulton L.J. and Buckley L.J. in the case of *David* v. *Britannic Merthyr Coal Co.* (3), it cannot be denied that a powerful body of authority stands on the books in favour of the proposition, in its absolute sense that the defence of

(1) [1898] 2 Q. B. 402, 410. (2) [1898] 2 Q. B. at p. 413.
(3) [1909] 2 K. B. 146, 147.

common employment is not pleadable to an action based upon the neglect of statutory duty. I desire for myself to say that I appreciate the force and cogency of the opinion of Fletcher Moulton L.J. in the case of *David.* (1)

There are three views: (1.) Either the imperative declaration of Parliament that the air of a pit should be fit to breathe by the workman must be read in, what is ex facie, its absolute and peremptory sense, subject to no exception; or (2.) this declaration is subject to exception in every case where personal fault cannot be established against the mine owner, and the defence of common employment is one so imbedded in the law, that it must be assumed to have been left open unless expressly excluded by the terms of the Act; (3.) or a third situation may be figured, of which *David's Case* (2) is indeed an example. The Court of Appeal in *David's Case* (2), notwithstanding the judgments referred to, did not apply the rule in its absolute sense, but remitted the case for new trial, leaving the burden of proof upon the mine owner to establish the defence that he had done everything possible to obey the terms of the statute, and that what happened had occurred by reason of some disregard of the rules, in defiance of the owner's regulations and efforts. This view was acquiesced in by the House of Lords, but I desire to put on record that I do not for myself express any dissent from the main proposition laid down by Fletcher Moulton L.J., which is in line with those already cited from Lord M'Laren, A. L. Smith L.J., and Rigby L.J., that the defence of common employment is not applicable where a statutory duty imperatively laid has been neglected. I repeat that it was not treated as necessary to decide that question in *David's Case.* (2)

The case may be figured of the most careful superintendence, the most complete compliance by the mine owners, so far as they were concerned, with every obligation resting upon them under the statute, of the settled order and management of the mine being in such a position that, unless disturbed, the statute would have been in all points complied with; and yet that such a disturbance took place by reason of something which,—to put it in the language of another Act of Parliament,—might be called the serious

(1) [1909] 2 K. B. 146, 147.

(2) [1909] 2 K. B. 146.

and wilful misconduct of some person engaged in the employment. I take that case to be reserved, and I treat the point of whether responsibility in such cases would attach to the mine owner as not one which is necessary to be here decided. But, my Lords, when I come to this present case I find that it is in no respect whatever to be a case of the disturbance of the settled order and management of this mine; but, upon the contrary, it is a case in which the judges have found that what did occur happened not by reason of any person interfering with the management, interposing something which caused the accident, in spite of all that the owners and the management had done, but simply and solely in consequence of the equipment of the mine, in the sense of the staff charged with the performance of the statutory duties, being insufficient; because the staff was entirely ignorant of what was necessary in gassy mines for the protection of human life. I cannot, my Lords, bring myself to think that such a state of matters as that is permissible without civil responsibility at common law in face of a statute which has declared for the protection of the lives of the workmen in mines in this country that the air in which they work and travel shall be fit to breathe.

My Lords, rule 7 makes stipulations for the withdrawal of workmen in case of danger; it confirms, in my judgment, the need for the knowledge of noxious gases on the part of the management, and in no respect abates or shifts the obligations upon the owner arising under rule 1. It appears from the judgments of the judges of the Second Division that the manager was appointed in 1902, and the under-manager and fireman in 1904. At these dates this pit was not known to be gassy, and although, for myself, I should hold it to be a dangerous thing, some excuse might be tendered for the proposition that the staff need not be acquainted with gas dangers. In 1901, however, in an adjoining pit several men lost their lives by the escape of carbon monoxide gas, and in 1905 a connection was made of that gassy and dangerous pit with the pit now in question, the latter being thus rendered, as is now lamentably clear, liable to the presence of the fatal gases. My Lords, what was done to equip the officials of the latter pit with the

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BUTLER (OR BLACK) v. FIFE COAL COMPANY, LIMITED.

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knowledge necessary to cope with the changed and dangerous conditions? It rather appeared that nothing was done. They remained as ignorant as before.

It is at this point that reference can appropriately be made to the procedure of this House in the cause on July 25, 1910. On that day it was adjudged "That with a view to the further hearing of the cause, the cause be, and the same is hereby remitted to the Second Division . . . . in order that the learned judges of that Division may pronounce a finding of fact upon the following question, viz.:—When the connection was made with the old mine in which smouldering fires, followed by the giving off of carbon monoxide gas, had previously occurred, did the defenders take all practicable means to secure that the persons engaged in supervision, and the fireman appointed as a competent person under the statute, were possessed of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?"

The learned judges have given in answer a careful series of eight findings dealing with the history of the pit and other matters, but the reply to the specific question remitted by the House is answer 8, which is in these terms: "That it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide; and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits was made, or thereafter, to secure that the knowledge and qualifications of the persons engaged in the supervision, and of the fireman, were sufficient to enable them to deal with the special danger which might arise from a sudden outburst of carbon monoxide gas."

This matter being thus cleared up, I now recall the situation as described in the findings of the Second Division. Three men, the manager, the under-manager, and the fireman, have been found incompetent by the sheriff-substitute on account of their ignorance of the knowledge which would appear to be elementary if human life is reckoned of value in such circumstances. The Court of Session do not pronounce, notwithstanding these express findings of incompetency, that the men so failing in the equipment

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of knowledge were competent (it is manifest that that could not be done, it would not be a finding but a flat contradiction of fact), but they find that they were "possessed of the qualifications and experience usually required of persons holding these offices." A pronouncement has been made that the staff of a mine is possessed of the qualifications and experience usually required, although the officials are men who do not know the elementary necessities for the protection of the lives of the workmen who are under their orders.

The great gravity and general importance of an acquittance of the mine owners from common law responsibility, an acquittance which is furnished on any such finding, is only too obvious. And still more serious may be the effect in destroying, or tending to destroy, those safeguards which Parliament had set up in the case of those working in the coal mines of the country. It is admitted that if the mine owner had been an individual managing his own pit—had been, as I suppose is possible, his own certificated manager—and ignorant of the requirements or dangers attending the working of those gas-bearing seams which formed part of the workings, his plea of ignorance would have availed him nothing as a civil defence to a common law claim, and that the plain imperative of the statute bound him in the responsibility of providing his workmen with those protections which had been prescribed. But it is said that the owner can escape the responsibility of his own dangerous ignorance by organizing the mine with a staff labouring under the same dangerous ignorance, and that, although the former case would fall under the plain peremptory rule of the statute and its consequences, the latter case forms an exception thereto.

My Lords, when one considers that nearly the whole, if not all, of the mines of this country are under delegated management, then this alleged exception to the imperative statutory rule is seen to be no mere exception, but to be equivalent to a destruction of the rule as a safeguard of life. It is argued that Law Courts must consent to this destruction because the exception is the fruit of legal doctrine; and the decision of the Second Division is defended on that ground. The commanding principle in the construction of a statute passed to remedy the evils and to

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protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.

But the Court below hold that the company are not responsible at common law, because these men were fit when appointed, Lord Low remarking on the fact that the connection between the two pits "was not made till early in 1905, a considerable time after the appointment of these men."

With much respect to the Court below, it humbly appears to me that they have not attached the proper significance to these facts. When this pit was turned, or possibly turned, into a gassy pit, then—if not before, certainly from that time onwards—the permitting of men without the requisite knowledge of gases and their dangers to be on the managing staff of the mine was an inexcusable neglect on the part of the owners, and I fail to understand what a reference to some previous date and a different set of conditions has to do with abating this serious responsibility.

But this point is made, unhappily, clearer by another, namely, by considering what rule 7 requires as to the inspection when gases are found in any part of the mine. "A competent person appointed for the purpose" is to inspect and make a report, and no person" is to be admitted, &c., until he "the competent person declares that it is no longer dangerous, but free from noxious or deadly gases."

Not one of these things was done in the present case. For who was the "competent person"? The owners had recognized their duty to appoint a competent person, and he had accordingly been named as such by the 43rd special rule of the pit. He was the fireman, the man possessed of no theoretical or practical knowledge on the subject of pit gas, and appointed before the connection with the gassy pit was made. This was the man who was ticketed by the owners as the "competent person" under the statute. In my opinion, my Lords, this proceeding was, on the part of the owners, most highly reprehensible and dangerous, and it led to these two men's deaths. It constituted what, in my opinion, was a defiance of those protections which the Coal Mines

Regulation Act had, after scrupulous care by Parliament, thrown around the coalworkers of this country.

In my opinion the judgment should be reversed, and the decree given for the sums brought out by the learned sheriff-substitute as due at common law should be restored.

LORD ASHBOURNE. My Lords, the question in this case is whether there is a liability in common law or under the Mines Regulation Act, 1887, or whether the damages can be assessed only under the Employers' Liability Act.

Your Lordships cannot review the findings of fact in the Second Division which were originally before the House, but your Lordships are at liberty to consider whether, taken in connection with the further finding on the remit ordered, a question of law is raised which calls for examination.

It is found that there was negligence on the part of the assistant manager and the fireman, but that the respondents are not liable, as those officials were in a common employment with the deceased, and were appointed by the respondents after they were "satisfied that they were possessed of the qualifications and experience usually required of persons holding these offices."

I do not think this is a very satisfactory statement that they were believed by the respondents to be entirely competent, but I believe, from the language used by Lord Low, that that was the opinion of the Second Division.

The gas that produced the fatal effects was carbon monoxide gas, a deadly but obscure gas of slow and insidious action, not very familiarly known in ordinary mines, but likely to be generated in and likely to escape from a pit, part of which had a smouldering fire, being the product of imperfect or incomplete combustion. The respondents were acquainted with the risks of this gas. They had themselves an unextinguished or smouldering fire in one of the neighbouring pits, and this so attracted their attention to the risks of monoxide gas, that they in 1901 circulated a pamphlet on the subject amongst their officials and employees, drawing attention to its dangers.

In the year 1905 a connection was actually made from the pit, the seat of danger, to the pit where the death was caused, and in the words of Lord Low, "The death of the miner was caused by carbon monoxide gas having found its way into pit No. 11 along the air passages from the old fire, and the managers and firemen were not alive to the danger, having no previous experience of carbon monoxide." This connection created a new and dangerous position in pit No. 11, which cast upon the defenders the onus of seeing that the manager, assistant manager, and fireman were competent to deal with this new peril, alive to its reality, and duly warned as to the observance of the rules 1 and 7 so often referred to. The case of *David* v. *Britannic Merthyr Coal Co.* (1) quite supports this view, and Lord Halsbury there said that "the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners" was on the defendants. Their Lordships deemed it right, after the first hearing here, in July, 1910, to remit this case to the Second Division to answer the question when the connection was made, "Did the defenders take all practicable means to secure that the persons engaged in supervision and the fireman appointed as a 'competent person' under the statute were possessed of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?"

The reply of the Second Division (after findings on the general case) was to the effect that it would have been practicable, and that the "defenders did not take any means at the time when the connection was made or thereafter to secure that the knowledge and qualifications of the persons engaged in the supervision, and of the fireman, were sufficient to enable them to deal with the special danger which might arise from a *sudden* outburst of the gas."

It will be noticed that the finding in the remit mentions "sudden outburst," which was not mentioned in the question remitted to them and cannot narrow the duty of the defenders.

Whatever may have been the statutory duty of the respondents as to ventilation adequate to dilute and render harmless noxious gases, I think that when this connection was made with pit No. 11 the steps in the question remitted should have been taken, and it is to be regretted special warning was not circulated amongst their officials, drawing their attention to the new and deadly danger which might be thus introduced by the possible and insidious presence of this monoxide gas. I think that the question needed closer examination than the Second Division gave it at the first hearing and required the remit to ascertain a crucial fact. What is the effect of the finding in the remit? We must not allow ourselves to be hampered or embarrassed by other findings. Is it shewn that it is now open to the House to consider whether the defenders are liable? I think it clearly is; and that your Lordships are quite justified in holding that the defenders were guilty of neglect of their statutory duties in not taking any steps to deal with the special danger of the presence of noxious gases arising from the connection made.

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(1) [1909] 2 K. B. 146; [1910] A. C. 74.

I therefore think that the appeal should be allowed.

Munro, K.C. The parties are agreed that the interlocutor of the sheriff-substitute should be restored.

Ordered that the interlocutor appealed from be reversed; that the interlocutor of the sheriff-substitute be restored; and that the respondents do pay to the appellants their costs in this House and in the Court of Session.

Lords' Journals, December 19, 1911.

Agents for appellants: *Walker, Son & Field, for D. R. Tullo, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

NOTE.—After hearing evidence, the sheriff-substitute (Hay Shennan), on July 30, 1907, pronounced the following interlocutor:—

"The sheriff-substitute finds in fact: (1.) The deceased Alexander Hynd Black, the husband and the father of the pursuers, was on 27th April, 1906, and for some time prior thereto in the employment of the defenders as an oncost worker in their No. 11 pit, Lumphinnans. On the night of Thursday, 26th April, he and Thomas Serrie were sent to repair the main brae in that pit. Early on the morning of Friday, 27th April, 1906, while they were so engaged, they were overcome by carbon monoxide gas and lost their lives: (2.) At the time of the accident the air current for ventilating No. 11 pit was brought down the shaft of No. 1 pit, being thus the downcast shaft, and after passing through the Lochgelly Splint and Parrot Seam of No. 1 pit ventilated all parts of No. 11 pit, the shaft of which was the upcast for the return air. The Lochgelly Splint and Parrot Seam is universally recognized to be specially liable to spontaneous combustion, and part of this seam in No. 1 pit was on fire in 1901. This outbreak was treated by sealing up the fire area with stoppings, but it was not possible in long wall workings as these were to be sure that the fire was quite extinguished. The air course from No. 1 pit to No. 11 pit passed near some of these stoppings, and any fumes which might escape from leaking stoppings must be carried with the air through all the workings of No. 11 pit: (3.) On Tuesday, 24th April, 1906, John Gray, who was manager of both pits, was informed by Hunter, an oversman in No. 11 pit, that there was a strange smell in the air coming to No. 11 pit, and he instructed Hunter to examine the workings. Hunter found some smoke issuing from stoppings not far from the seat of the old fire in No. 1 pit, and set men to repair them. Gray then formed the opinion that the smell came from the seat of the old fire in No. 1 pit: (4.) On Wednesday, 25th April, and Thursday, 26th April, there was smoke or haze with a peculiar smell in the workings of No. 11 pit, and several of the miners, including the deceased Black, were affected with headache and vomiting. Some of the men complained of the air to Gibbons, the fireman, who himself felt the effect a little in his head. The air on the Thursday was rather clearer in appearance. The men were allowed to work in the pit as usual on both days, and Black and Serrie were sent down on Thursday night to do repairing work: (5.) After the first discovered leak in the stoppings was repaired, smoke and fumes were found to be issuing from another leak, and men began to repair this second leak on Thursday, 26th April. On Friday, 27th April, about 3 A.M., a squad of men resumed work at this stopping; but in two or three minutes some of them were overcome, and they had to abandon the work of repair for the time. It was probably at this time that the deceased Black lost his life in No. 11 pit: (6.) The symptoms in No. 11 pit on the three days before the accident pointed to the recrudescence of the fire in No. 1 pit, and this entailed the danger of carbonic monoxide being thrown off from the fire through incomplete combustion. Carbonic monoxide is a deadly poison when present in the air in very small quantities, and it has no colour, taste, or smell, and can be detected only by its effects. But its presence in underground fires is a recognized danger, and it is usually preceded by, and sometimes accompanied with, a white watery vapour. The cause of the deceased Black's death was the escape of carbonic monoxide from the fire in No. 1 pit, and the possibility of this escape might have been reasonably anticipated and its consequences averted: (7.) John Gray, the manager of the two pits, though believing that a strange smell was coming from the seat of the old fire, did not know that there was any danger of a discharge of carbonic monoxide, and did not then know the symptoms of carbonic monoxide poisoning. He was not aware of the danger of allowing men to work in No. 11 pit while fumes were being discharged in noticeable quantities from leaking stoppings in No. 1 pit. Defenders were negligent in appointing to the charge of these pits in which there was risk of a fire breaking out a manager who was not competent to take the necessary precautions in view of a possible outbreak of carbonic monoxide gas: (8) John Hunter, though described as under-manager, and performing the duties of under-manager, was not appointed in writing as required by section 21 of the Coal Mines Regulation Act, 1887. For about a month before the accident, Gray, the manager, had through illness not been fit for complete work, and Hunter filled Gray's place so far as necessary. The defenders were negligent in allowing Hunter to act as under-manager, and to exercise daily personal supervision of the mine without appointing him in writing: (9.) Hunter was not qualified to act either as under-manager or as oversman in No. 11 pit. He was not aware of the liability of the Lochgelly Splint and Parrot Seam to spontaneous combustion, and he did not know of the danger of carbonic monoxide being thrown off from the fire. His professed theoretical knowledge of carbonic monoxide is most inaccurate. The defenders were negligent in appointing Hunter as oversman in a pit in which there was a risk of the air being contaminated with carbonic monoxide gas: (10.) John Gibbons, one of the firemen in No. 11 pit at the time of the accident, was not then qualified to act in that position. He did not know of the danger of carbonic monoxide being discharged into the air-course in the event of the fire in No. 1 pit becoming active. He knew nothing about carbonic monoxide, or of the precautions to be taken in connection with it. The defenders were negligent in failing to see that Gibbons was instructed on these matters at the time when the connection was made between No. 1 pit and No. 11 pit, and the air-course for No. 11 was brought past the fire area: (11.) The system of ventilation adopted by defenders for No. 11 pit was adequate and satisfactory so long as proper means were taken to secure that noxious gases were not discharged in injurious quantities from the fire area into the air-course: (12.) The defenders' officials, Gray, Hunter, and Gibbons, having duties of superintendence, were in fault in allowing men to work in No. 11 pit while the stoppings of the fire area were leaking, as they were on the two days before the accident: (13.) Pursuers have suffered loss through the death of the deceased Alexander Hynd Black, which may be fairly estimated at the sums of 200*l.* for Mrs. Black; 40*l.* for John Black; 40*l.* for William Butler Black; 60*l.* for David Cameron Black; and 60*l.* for Christina Erskine Black: Finds in law that the defenders are liable to pursuers in reparation for the death of the said Alexander Hynd Black in respect that his death was due to their negligence in failing to appoint competent officials in No. 11 pit: Therefore decerns against defenders in favour of the pursuer Mrs. Elizabeth Butler or Black for 200*l.* sterling for her own behoof; of the pursuers John Black and the said Mrs. Black, as his curator for 40*l.* sterling; of the said Mrs. Black as tutor for William Butler Black for 40*l.* sterling; of the said Mrs. Black as tutor for David Cameron Black for 60*l.* sterling; and of the said Mrs. Black as tutor for Christina Erskine Black for 60*l.* sterling: Finds the pursuers entitled to expenses: Allows an account thereof to be given in, and remits the same when lodged to the auditor to tax and to report: Allows a special debate fee of *5l.*: Authorizes additional allowances in terms of the Act of Sederunt to the witnesses Thomas Borland and Thomas Train Christie; and decerns.

"HAY SHENNAN."

The following interlocutor was pronounced by the Second Division, November 24, 1908:—"The Lords having heard counsel for the parties on the defenders' appeal against the interlocutor of the sheriff-substitute of Fife, dated July 30, 1907, sustain the appeal, and recal the said interlocutor appealed against: Find in fact in terms of the first five findings in fact in the said interlocutor appealed against: Find further in fact (6.) that the cause of the death of Alexander Hynd Black was the escape of carbon monoxide gas from the fire in No. 1 pit; (7.) that John Gray, the manager, John Hunter, the under-manager, and John Gibbons, the fireman, all at No. 11 pit, were possessed of the qualifications and experience usually required of persons holding these offices; (8.) that there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager, and fireman; (9.) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11 pit, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze, having a peculiar smell, had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps by withdrawing the workmen or otherwise to guard against injury to those employed in the pit, until the cause of the haze and the smell were discovered and removed; and (10.) that the said John Gibbons failed to observe the provisions of rules 4 (1.) and 7, enacted by s. 49 of the Coal Mines Regulation Act, 1887, and also of special rule 37, passed in terms of the powers conferred by s. 51 of the said Act, and that the said John Hunter failed to observe the provisions of said rule 7: Find in law that the pursuers have no claim against the defenders at common law, but only under the Employers' Liability Act: Therefore assoilzie the defenders from the first conclusion of the summons, and ordain the defenders to make payment of the sum of *282l.* *17s.* *6d.* as follows—To Mrs. Black of the sum of *142l.* *17s.* *6d.*; and to her children respectively as follows—To John Black, *28l.*; to William Black, *28l.*; to David Cameron Black, *42l.*; and to Christina Erskine Black, *42l.*—the said sums of *28l.*, *28l.*, *42l.*, and *42l.* being made payable to the said Mrs. Black as curatrix and tutrix for her children in minority and pupillarity respectively, she being responsible to account to them therefor; and decern: Find the pursuers liable in expenses in this and in the inferior Court, and remit the same to the auditor to tax and report." (1)

(1) See ante, p. 152, for the subsequent interlocutor dated July 12, 1911.

[PRIVY COUNCIL.]

J. C.*
1911
May 12;
Oct. 31.

MIZA MOHAMET TACKEY . . . . PLAINTIFF;

AND

R. S. F. McBAIN . . . . DEFENDANT.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AT SHANGHAI.

Action of Deceit—Untrue Statement to Third Party—Fraudulent Intent must be proved as alleged.

In an action of deceit the plaintiff must prove that the untrue statement made by the defendant was made with a fraudulent intent.

Where the verdict completely absolved the defendant from the fraud attributed to him, that is, making an untrue statement to a broker in order to depress for his own advantage shares in a company of which he was a director:—

Held, that the Court below was right in refusing a new trial on the ground of misdirection, as it appeared that the trial judge had properly instructed the jury on the material issue of fraudulent intent.

APPEAL from an order of the Full Court (January 17, 1910) dismissing an application for a new trial on the ground of misdirection in an action of deceit.

The action was for damages against the respondent for wrongfully causing the appellant to sell certain shares in a Dutch colonial company called the Langkat Company at an undervalue whereby the appellant suffered damage to the amount of 55,000 taels.

The statement of claim alleged that the respondent as general agent and manager of the company in Shanghai received on April 10, 1909, by cable news that oil had been found on the company's property in Sumatra in great quantities, that he improperly concealed the same from the general body of the shareholders until April 19 with fraudulent intent, and that during the interval he orally denied to persons other than the plaintiff or his agent the receipt thereof, thereby deluding the public, meaning the dealers and holders of shares including the plaintiff, who in consequence were induced to sell at less than the true market value of their shares.

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* *Present:* LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

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The respondent objected that the claim disclosed no cause of action and was bad in law on the grounds that false and fraudulent statements to persons other than the plaintiff or his agent, calculated to deceive and deceiving the public and giving rise to false rumours, gave no right of action to the plaintiff; and that there was no duty of the defendant to the plaintiff to give him the news withheld or to abstain from communicating or allowing to be communicated to or obtained by others the said news.

The jury found that the respondent had made a false representation to one Anderson and others to the effect that no news affecting the value of the company's property in Sumatra had been received by him or by the company, and that the plaintiff as a holder of its shares had acted thereon and was damnified in so doing.

On the question whether when making this false representation the defendant directly intended "that brokers and holders of shares should act upon such information by selling their shares on the 15th, 16th and 17th April" the jury found in the negative after receiving a further direction which included the following observations :—"The mere fact that he misled by a false statement does not necessarily prove that he was dishonestly misleading because he may have thought it necessary to keep this matter close for the interests of the company. The real point you have to consider is what was in his mind when he did that and you must find there is as much as a direct intention that shares should be put upon the market, that is to say that people should be induced to sell and that he must have had the intention when he made his statement of making people sell."

The Chief Justice dismissed the action, and on the appellant's application to set aside the above finding in the negative on the ground of misdirection the Full Court was equally divided and the application was therefore dismissed.

Bailhache, K.C., and *A. H. Chaytor*, for the appellant, contended that this order should be reversed and a new trial directed. They contended that the jury ought to have been directed that the defendant's motive in making the statements complained of and also his knowledge of their probable effect

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were matters of evidence which they ought to consider in deciding upon the defendant's intention in making them. They ought further to have been directed that a desire to avoid making a large loss was a motive bearing upon that intention; and that the respondent must be taken to have intended the reasonable and probable consequences of his acts. The finding that the plaintiff had acted on such information and had been damnified in so doing was inconsistent with the finding complained of. Reference was made to *Smith* v. *Chadwick* (1); *Arnison* v. *Smith* (2); *Andrews* v. *Mockford* (3); *Swift* v. *Winterbotham* (4); *Richardson* v. *Sylvester* (5); *Peek* v. *Gurney.* (6)

Sir R. Finlay, K.C., Atkin, K.C., and *H. M. Giveen,* for the respondent, contended that there was no misdirection. The jury were told in effect that the question was whether the defendant had a definite intention that the plaintiff or the class to which he belonged should sell, and that that definite intention must be deduced from the surrounding circumstances, acts and motives of the defendant. The knowledge of the probable effect of his statement was insufficient by itself to be the basis of a finding as to the actual intention. They contended that there was no evidence on which the jury could have reasonably given an affirmative answer on the question of the fraudulent intention imputed to the defendant; or that any representation had been made to the plaintiff with a view to its being acted upon by him or with a view to deceive any class of which he was a member. There was no evidence of any sufficient connection between the defendant's representations and the plaintiff's acts to establish any liability on the defendant, and therefore no cause of action had been shewn.

Chaytor replied.

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Oct. 31.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court for China and Korea sitting as the Full Court at

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(1) (1884) 9 App. Cas. 187, 190.
(2) (1889) 41 Ch. D. 348.
(3) [1896] 1 Q. B. 372, 374, 378.
(4) (1873) L. R. 8 Q. B. 244, 253.
(5) (1873) L. R. 9 Q. B. 34, 36.
(6) (1873) L. R. 6 H. L. 377, 402, 411.

Shanghai. The order appealed from dismissed an application made on behalf of the appellant—the plaintiff in the action—for a new trial on the ground of misdirection. The trial had taken place before Sir Haviland de Sausmarez C.J. and a jury. The Full Court consisted of the Chief Justice and an assistant judge. The Chief Justice held that there was no misdirection in his charge to the jury. The assistant judge took a different view. According to the rule of the Court the opinion of the Chief Justice prevailed.

Disembarrassed of the wild rumours which seem to have been rife on the Shanghai Stock Exchange, reduced to its proper proportions, and confined to the real point in controversy, the case does not present any difficulty. The action was an action of deceit. In such an action it is incumbent on the plaintiff to prove actual fraud. That has been the law in this country from the earliest times, and the law has been emphatically reasserted in the comparatively recent cases of *Smith* v. *Chadwick* (1) and *Derry* v. *Peek*. (2)

After a trial which lasted four days and a most elaborate summing up by the Chief Justice, the jury returned answers to certain questions in the result negativing altogether the charges of fraud and dishonesty which had been brought against the defendant.

Mr. McBain, the defendant in the action and respondent in this appeal, was a director and the general agent at Shanghai of an oil-producing company commonly known as the Langkat Company. The company, whose chief property was in Sumatra, had been established for several years. Apparently it was paying satisfactory dividends, but there was a good deal of gambling in its stock, and in March, 1909, there were rumours of a corner in Langkats.

On April 10, 1909, the Saturday before Easter Sunday, Mr. McBain received a telegram from the manager in Sumatra, stating that hole No. 94, which had been recently opened, was producing oil in large and, indeed, unprecedented quantities. Mr. McBain sent the manager a congratulatory telegram. Then he bethought him that in February he had sold for the June

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(1) 9 App. Cas. 187, 190.
(2) (1889) 14 App. Cas. 337.

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settlement 400 shares, a number which exceeded his actual holding by 110 shares. He was going up country in the afternoon, so he sent a note to Mr. Elmore, who had been in his employ since 1902, requesting him if there should be any decided strength or advance in Langkats in the early part of the following week to buy for him 400 or 500 shares for the June settlement. On the evening of Wednesday the 14th, Mr. McBain returned to Shanghai. The next day, Thursday the 15th, is the most important date in the history of the proceedings which led to this litigation. On that day Mr. McBain went to his office at 9.30 A.M. At 10 A.M. his broker, Mr. Benjamin, called. The rise in Langkats was the subject of conversation between them. Mr. Benjamin had returned to Shanghai too late on the 14th to do anything in execution of Mr. Elmore's order, so Mr. McBain asked him to buy back if he could the shares which he had sold in February for the June settlement, and said he should like 200. Mr. Benjamin said he would do what he could and left the office. At 10.30 A.M. Mr. Benjamin returned and said that he had bought 200 Langkats. This amount more than covered the number by which Mr. McBain had sold short. At 11 A.M. Mr. Arthur Anderson, who was then chairman of the Shanghai Stock Exchange looked in to find out, if he could, for his own advantage, what was the cause of the sudden advance in Langkats, and what news, if any, the directors had received from Sumatra. He had been acquainted with Mr. McBain ever since Mr. McBain came to Shanghai. Mr. McBain, he says, was very affable and chatty as usual. Mr. Anderson plied him with suggestions and questions until at last Mr. McBain, who had done his best to avoid disclosing confidential information, was driven into a corner, and then (as perhaps better men have done in the stress of similar circumstances) took refuge in a false statement. He said that the company had received no information, good, bad, or indifferent. There can be little doubt that Mr. McBain did say so, for he made the same statement to another broker later in the day, and apparently on that occasion without any pressure. It is hardly conceivable that he would have so made such a statement unless he had been already committed to it.

In the afternoon of the same day Mr. Benjamin offered

Mr. McBain ninety-five shares in Langkats for cash, and Mr. McBain, objecting to the price, took them rather unwillingly.

On April 17 there was a meeting of the directors. In the meantime a telegram had been received from Sumatra in answer to an inquiry from Shanghai, saying that the yield from hole 94 was maintained. Then in view of the excitement on the Stock Exchange, and a strong suspicion of leakage in the office, the directors resolved to publish the news in the *North China Daily News* and to send a circular to the shareholders. This circular was delivered to the shareholders on Monday April 19.

On that Monday Mr. Benjamin offered Mr. McBain 200 more shares in Langkats. Mr. McBain did not want to take them. He thought the price was then too high and he thought it would soon fall, as in fact it did. But Mr. Benjamin, to use his own words, " forced those shares down his throat."

That is the sum and substance of Mr. McBain's dealings in Langkats in April, 1909. He was censured very severely and very properly by the learned Chief Justice for gambling in the shares of a company of which he was a director and he was taunted throughout the proceedings with having told a lie. But for all that he seems to have given his evidence in a very straightforward manner and to have made a favourable impression on the judge and on the jury.

In determining whether the untrue statement made by Mr. McBain was uttered with the fraudulent intention of depressing the shares in the Langkat Company for his own advantage, all the circumstances of the case, including of course the position in which Mr. Anderson had placed him, and the difficulty of escaping from Mr. Anderson's pertinacity, must be taken into consideration. One thing at least is clear. It could not have been originally any part of the fraudulent scheme attributed to Mr. McBain to use the Shanghai brokers as his instruments in depressing the market. He did not seek them out. They flocked to his office. Mr. Anderson and other brokers descended upon him in the hope of picking up some confidential communication not intended for their ears. It is, perhaps, conceivable, but not by any means likely, that when Mr. McBain was pressed by Mr. Anderson he saw his opportunity and determined on a sudden to use Mr. Anderson as an instrument for disseminating false news. Mr. McBain was severely cross-examined. He stated on oath that in withholding from the public the news received from Sumatra he never thought of his own private interest; such an idea, he said, did not enter his head. The judge and the jury saw his demeanour in the witness-box. And apparently they believed him. Moreover, it must be borne in mind that at the time when the untrue statement was uttered Mr. McBain had already secured as many shares as were wanted to make him safe for the June settlement. And he was evidently unwilling to buy more at the price which they had then reached.

Mr. Anderson's justification or excuse for his conduct in seeking to extract a confidential communication seems to have been a bold assertion that it was the practice of the company to publish at once all telegrams as they were received. That assertion, however, was absolutely disproved. The only foundation for it was that on one occasion the directors did publish a wire stating that oil had been found. That was on a concession at Acheen, about a hundred miles away from Langkat. The field had not been developed or proved at the time. So that was a very different case. Then it was said that every broker in Shanghai was ready to do what was done by Mr. Anderson. That is true more or less. All the brokers examined on behalf of the plaintiff, with one honourable exception, had no scruples on that score. Mr. Benjamin, however, who seems to be the leading broker in Shanghai, in cross-examination as to his interview with Mr. McBain on April 15, being asked what Mr. McBain said to him, answered: "I went there, I told him, I said there seems to be quite a boom in Langkats but I did not ask him why because I knew he would not tell me. I did not think it was my business to ask him as a broker." All the other brokers examined on behalf of the plaintiff were shocked to think that the manager of a company could tell an untruth to a broker, but there was not one of them who seemed to have thought that there was any harm in a broker trying to worm out secrets from the confidential manager of a company.

Now, if the case had been left to the jury on this simple issue—fraud or no fraud—probably they would have had no difficulty in coming to a conclusion. But unfortunately, and apparently at the instance of the defendant's counsel, a set of questions was put to the jury framed on the propositions laid down by Lord Cairns in *Peek* v. *Gurney*. (1) Undoubtedly there is a superficial resemblance between this case and the case with which Lord Cairns was dealing. There is, however this, essential difference. In *Peek* v. *Gurney* (1) there was a prospectus adjudged to have been fraudulent as between the promoters and the persons who took shares on the faith of the statements it contained. The only question was, Could the plaintiff connect himself with that prospectus as one of the class of persons to whom it was addressed? Here the real question is, Was Mr. McBain's statement, though undoubtedly untrue, made with the fraudulent intention attributed to Mr. McBain by the plaintiff? The question whether the plaintiff was in a position to connect himself with the person or persons to whom the statement was made is another question which does not arise unless the statement was fraudulent as well as untrue.

It is not necessary to set out or discuss the questions left to the jury by the Chief Justice. On the material question which involved the question of fraudulent intent the jury at first hesitated under a misapprehension, not improbably created by the questions which were left to them and the learned disquisition of counsel on authorities more or less irrelevant. They came back for further directions. But on being instructed, and as their Lordships think properly instructed by the Chief Justice, they found a verdict which completely absolved the defendant from the fraud attributed to him.

It would serve no useful purpose to discuss the judgment of the learned assistant judge. Their Lordships are unable to agree with his view as to the facts or his view as to the law.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Coward & Hawksley, Sons & Chance.*

Solicitors for respondent: *Stephenson, Harwood & Co.*

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(1) L. R. 6 H. L. 377.

[PRIVY COUNCIL.]

J. C.*
1911
July 19;
Nov. 2.

LADY DE SOYSA AND OTHERS . . . . DEFENDANTS;

AND

STANISLAUS DE PLESS POL AND ANOTHER . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Contract for Lease—Condition Precedent—Continuous Breach — Liquidated Damages — Condition that Lessee should not assign without Lessor's Consent not to be implied—C. C. P., ss. 5 and 404.

In a contract for a lease it was a condition precedent that the intending lessors should complete by a fixed date certain specified works and render the house to be leased fit for habitation; the sum of Rs.150 to be paid in respect of every day thereafter that the works remained uncompleted:—

Held, in an action for damages, that the omission to complete the works was a continuous breach of contract after the fixed date, and that the stipulated daily sum was not a penalty, but was recoverable down to the date of action as liquidated damages. Also that, as the contract had been in effect abandoned, further damages down to the date of judgment were on the evidence rightly assessed as within the contemplation of both parties.

The contract did not expressly provide that the lessee should covenant not to assign without the lessors' consent, but did stipulate that the intending lessors should not withhold their consent except for exceptionally strong and good reasons:—

Held, that the intending lessee was not bound by implication to covenant as suggested, and that the co-plaintiff who had been added as derivative assignee of the contract and of the action was entitled to maintain the suit jointly with the said lessee.

The rulings of the Supreme Court—(1.) that under C. C. P., s. 5, the breach which arose within the jurisdiction was the whole cause of action; (2.) that an assignment of the right of action after litis contestatio was permissible under s. 404—were approved.

APPEAL from a judgment of the Supreme Court (October 12, 1909) affirming a final judgment of that Court (March 4, 1909), and also from two interlocutory judgments (October 2, 1906, and April 24, 1907).

On December 19, 1905, the first respondent sued in the District Court of Kandy to recover damages for breach of an agreement dated February 17 in that year (the material provisions of which are sufficiently set out in their Lordships' judgment) to lease Haramby House for a period of ten years from June 15, 1905. The lease was to be executed as soon as certain alterations and improvements to the said premises should be completely finished and the house made fit for occupation. May 15, 1905, was alleged to be the due date for completion of the works, and the plaint sought to recover Rs.32,400, being Rs.150 a day from the said May 15 till the date of action, and a further sum of Rs.150 a day from date of action to the date of completion of the works.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

The defendants pleaded to the jurisdiction of the Court, that the sum of Rs.150 a day was a penalty and not liquidated damages, that the plaintiff by reason of his assignment of the contract to Perianen Chetty could not sue on it, and claimed in reconvention that the plaintiff, notwithstanding his refusal so to do, should be decreed to enter into a lease as aforesaid.

The District Court overruled the defendants' objection that the cause of action did not arise within the territorial limits of the jurisdiction inasmuch as the whole cause of action was compounded of the contract and the breach, and here the contract was made in Colombo and only the breach occurred in Kandy. It held that by s. 5 of the Civil Procedure Code cause of action was defined to be the wrong for the redress of which an action may be brought, which excluded the defendants' contention. The interlocutory judgment of the Supreme Court, dated October 2, 1906, affirmed this construction of s. 5.

On April 24, 1907, the Supreme Court, overruling the District Court in that respect, ordered that the second respondent Shattock, who had taken after action brought an assignment of the contract from the said Perianen Chetty, should be added as a co-plaintiff to carry on the action jointly with the first respondent. The Court held that whatever the provisions of Roman-Dutch law with regard to the assignment of a right of action after litis contestatio, they merely established a rule of procedure, and s. 404 of the Civil Procedure Code overrides it.

On the merits the District Court found on November 11, 1907, that the date of completion had been extended to September 1, 1905, and that damages had been waived to that date; that the

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works had not been completed; that the first respondent was entitled to Rs.16,500 up to December 19, 1905, and to Rs.60,000 as damages from that date to the date of his judgment. He declared the contract to be determined as from that date.

The Supreme Court in its judgments of March 4 and October 12, 1909, affirmed this judgment.

P. O. Lawrence, K.C., Atherley-Jones, K.C., H. E. Miller, and *F. H. M. Corbet,* for the appellants, contended first that the District Court had no jurisdiction. It was submitted that the cause of action arose at Colombo, where the contract was made and the appellants reside. It was not sufficient to shew that the breach occurred within the territorial limits of the District Court of Kandy: see Civil Procedure Code, s. 9 (*c*). The whole cause of action is founded on a number of circumstances and at least includes the contract as well as the breach. They relied upon *Read* v. *Brown* (1) and Lord Esher's judgment therein. Secondly, that the plaintiff having assigned his claims could not continue the action, and that the assignee could not do so, since the assignment was made after litis contestatio. The District Judge was right in holding that by Roman-Dutch law (see 2 Nathan's Common Law of South Africa, p. 735, which he considered applied to Ceylon also) the assignment was void. Sect. 404, C. C. P., therefore did not apply to it. See Voet 19, 2, 5 (p. 202 of Berwick's translation). The plaintiff never sought for and never obtained the defendants' assent to the assignment notwithstanding an implied covenant in the contract not to assign the intended lease without consent: see *Eastern Telegraph Co.* v. *Dent.* (2)

[As regards the meaning of the term "usual covenants," whether it includes a covenant not to assign without consent, LORD MACNAGHTEN referred to the judgment of James L.J. in *Hodgkinson* v. *Crewe.* (3)]

In this case the lessors' covenant as to not withholding his consent would be unmeaning unless the lessors' covenant not to assign is implied. As to plaintiff's claim to liquidated damages, see *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos, Yzquierdo* v. *Castaneda* (1), and *Public Works Commissioner* v. *Hills.* (2) The intention of the contract was that the agreed amount should be regarded as a penalty; not that it should be recoverable as liquidated damages.

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(1) (1888) 22 Q. B. D. 128.
(2) [1899] 1 Q. B. 835.
(3) (1875) L. R. 10 Ch. 622.

Atkin, K.C., and *Mears*, for the respondents, were not heard upon the first two points, but contended upon the question of damages that the intention of clause 5 of the agreement was that the respondents should be entitled to the agreed amount as liquidated damages. The District Judge was right in awarding damages down to the date of assessment and in taking into account any prospective damages which they might suffer in consequence of the breaches complained of. All parties assented to the contract being treated as at an end and to damages being assessed once for all. They were not excessive but reasonable and moderate under all the circumstances and had in fact been suffered. They were proved to have been the natural consequences of the breaches complained of.

Atherley-Jones, K.C., replied.

The judgment of their Lordships was delivered by

1911
Nov. 2.

LORD ATKINSON. This is an appeal from a final judgment in review of the Supreme Court of Ceylon, dated October 12, 1909, affirming a final judgment of the same Court, dated March 4, 1909; and also from two interlocutory judgments of the same Court, the first bearing dated October 2, 1906, and the second April 24, 1907.

The action, in the different stages of which these several judgments were pronounced, was instituted by the respondent De Pless Pol in the District Court of Kandy to recover damages for breach of a certain agreement, dated February 17, 1905, entered into between the plaintiff De Pless Pol and the appellants. The sum of Rs.150 per day was claimed as liquidated damages, from May 15, 1905, the date of the alleged breach, to the bringing of the action, amounting to Rs.32,400, and a further sum calculated at the same rate, from this latter date to the completion of the works with which the said agreement was conversant.

(1) [1905] A. C. 6. (2) [1906] A. C. 368, 375.

The damages actually awarded by the District Judge of Kandy were Rs.16,500 in respect of the continuing breach by the defendants of their contract up to December 19, 1905, and Rs.60,000 in respect of the damages sustained from that date up to the date of the judgment. He further declared that the agreement between the parties in respect of the breaches of which the action was brought was determined as and from the latter date, and condemned the defendants in the costs of the action. This judgment was affirmed on appeal in the Supreme Court by the judgments already mentioned.

By the contract of February 17, 1905, so declared to be determined, the appellants agreed to grant to the said De Pless Pol a lease of the lands and premises known as Haramby House, as soon as certain works, buildings, additions, and alterations should be executed thereon and effected therein, for a period of ten years from June 15, 1905, at the rent of Rs.150 per month for the first two years of the term, Rs.200 per month for the third and fourth years, and Rs.300 per month for the residue of the term. It was admittedly the purpose of the contracting parties to convert the premises into a hotel, to be called the Savoy Hotel. Glowing accounts were given of the beauty of the situation, and of the palatial proportions of the intended structure, and extravagant hopes were, apparently, entertained of the ultimate success of the project.

The agreement contained further provisions both as to execution of the contemplated works, and the contents of the promised lease necessary to be considered. The works to be executed are specified in schedule B attached to the agreement. They are described, in some instances, in vague and general language, such as "building and increasing the size of some rooms," and "the construction of six additional bedrooms (as being constructed at present)." In several instances no dimensions or details are given, and by the provisions of paragraph 5 of the agreement the appellants bound themselves to execute these works at their own expense in a good substantial and workmanlike manner, and to complete the house so as to be fit for habitation on or before May 15, 1905. This period was subsequently extended by consent till September 1, 1905.

By the second paragraph of the agreement it was stipulated that the contemplated lease should contain covenants by the lessee to pay the rent reserved, all rates and impositions, and interest at 10 per cent. per annum on the actual value of the works mentioned in schedule B, keep and leave the premises in good repair, and not to use them for any purpose other than that of a dwelling-house, boarding-house, or properly conducted hotel. It was by paragraph 3 provided that the lease should contain in addition all covenants and conditions usually inserted in leases of such nature, and a proviso for re-entry by the lessor upon non-payment of the rent or interest for thirty days after same became due, or on breach by the lessee of any of the covenants by him contained in the lease. Though it is provided that the lease is to be made to the "lessee," that term is defined to include his heirs, executors, administrators, or assigns, and there is no express covenant not to assign, either with or without the lessor's consent. And it is not disputed that such a covenant would not be covered by the words "usual covenants."

There is a provision, however, in paragraph 4 of the agreement that the lessor shall, amongst other things, covenant "not to withhold, except for exceptionally strong and good reasons, his consent to the lessee at any time during the said term, assigning all his interest in the said lease to any other party or parties or his sub-leasing the said premises." Mr. Lawrence, on behalf of the appellants, contended forcibly that this provision would be meaningless unless the contemplated lease should contain a covenant by the lessee not to assign or sub-let without the previous consent of the lessor, and insisted that the parties must be taken to have intended that the contemplated lease should contain such a covenant and also a reciprocal covenant by the lessor not, when asked, to withhold unreasonably his consent to such an assignment or sub-lease, and that the rights and obligations of the contracting parties should accordingly be determined as if these two covenants had been introduced, by implication, into the agreement. The point was of considerable importance in the case, because the lessee had, on July 3, 1906, after action brought, sold, and by deed of that date assigned to Mr. R. P. L. Perianen Chetty all his right, title, and interest in the agreement of February 17, 1905, and also his right, title, and interest in and to the pending action. And Perianen Chetty subsequently assigned by deed to one E. M. Shattock all the right and interest in the said agreement and pending action so purported to have been assigned to him by the deed of July 3, 1906. This point will be considered hereafter. The agreement contained a further provision to the effect that furniture, plate, linen, wines, stock in trade, and general equipment to the value of Rs.7000 should be brought into the premises by the lessee, for the purpose of running the contemplated hotel, and should be kept at that level, and that contemporaneously with the execution of the lease the lessee should mortgage these chattels to the lessors as a further security for the payment of the rent reserved, and for the performance of the lessee's covenants to be contained in the lease. It is now admitted that the works specified in the agreement were never carried out by the lessors, and it is clear upon the evidence that the plaintiff, De Pless Pol, was a heavy loser in the transaction. In the answer to the plaintiff's plaint filed in the District Court of Kandy on February 7, 1906, by the appellants, they pleaded amongst other things that the District Court at Kandy had no jurisdiction to entertain the suit. They raised the question that the sum of Rs.150 per day claimed to be payable in respect of the omission was a penalty, not liquidated damages, alleged that the plaintiff, De Pless Pol, had refused to enter into a lease with the appellants as required by the agreement, and, in respect of this last-mentioned averment, claimed relief in "reconvention that the plaintiff be decreed to enter into a lease as aforesaid."

This answer was subsequently amended by the addition of a paragraph 1a, setting forth the assignment above mentioned by De Pless Pol to Perianen Chetty, and averring that, as a matter of law, De Pless Pol, the plaintiff, could not, by reason thereof, maintain the action; but the relief prayed remained unaltered.

On May 31, 1906, the following issues were settled by the agreement of the plaintiff's proctor and the defendant's counsel:—

"1. Whether this Court has jurisdiction to hear and determine this action.

"2. Did the plaintiff request the defendants to make certain additions to and deviations from the works specified in schedule 'B' of the agreement pleaded, and was the completion of the work thereby delayed?

"3. Did the plaintiff in consequence extend the time for the completion of the work to the 1st September, 1905, and waive his claim to damages, if any?

"4. After the 1st September, 1905, did the defendants, at the request of the plaintiff, make further additions and deviations as aforesaid, and was the completion of the work thereby delayed, and was the time for completion extended thereafter, from time to time, with the consent of the plaintiff, till the 31st December, 1905?

"5. Was the work, in point of fact, completed on 31st December, 1905, and did plaintiff take possession of the house on or about that date?

"6. What damages, if any, is the plaintiff entitled to record?"

It will be observed that no issue is raised upon the paragraph added by amendment to the appellants' answer.

The District Judge, on June 5, 1906, delivered judgment on the first issue, holding rightly, in their Lordships' view, that he had jurisdiction to entertain the suit. This order was appealed from, and the Supreme Court, by its order of October 2, 1906, dismissed the appeal.

An application was made on behalf of E. M. Shattock to the District Judge of Kandy in the month of January, 1907, that his name might be added as a plaintiff to the record. The application was refused; but by an order of the Supreme Court dated April 24, 1907, the order of the District Judge was set aside, and an order purporting to be made in pursuance of the provisions of the 404th section of the Civil Procedure Code, 1889, was made to the effect that Shattock might be added as a co-plaintiff with De Pless Pol.

The case ultimately came on for trial before the District Judge at Kandy on September 22, 1907. It appears to have lasted several days. The issues of fact were all, it would seem, found in favour of the plaintiffs. The trial judge apparently held that the omission or neglect of the appellants to complete the works after September 1 was a continuing breach of their contract, and that the sum of Rs.150 stipulated in paragraph 5 of the agreement to be paid in respect of every day they remained uncompleted was in the nature of liquidated damages, and not merely a penalty. He accordingly awarded to the respondent De Pless Pol damages at this rate in respect of the delay from September 1 to the institution of the action on December 19, 1905. In their Lordships' view the District Judge was right in holding that the breach was a continuing breach, and having regard to the number, dissimilar character, and vague description of the several things contracted by the appellants to be done, their Lordships see no reason to dissent from his conclusion that the sum of Rs.150 per day was liquidated damages, and not a penalty, and therefore that the sum of Rs.16,500 was well and properly awarded.

The second part of the order of the District Judge presents more difficulty. In respect of the non-completion of the work after the date of the institution of the action up to the date of the judgment he awarded Rs.60,000 damages, and declared the agreement of February 17, 1905, to be determined from that date. It is obvious that the sum of Rs. 60,000 is much less than Rs.150 per day from December 19, 1905, to November 11, 1907, but it is urged by Mr. Lawrence against this part of the decision that the Court, even if the breach were continuous, had not, either under the Roman-Dutch law or the Civil Procedure Code of 1889, any jurisdiction, such as is conferred by rule on English Courts, to award damages in respect of the portion of the breach which continued after action brought; and, further, that neither of the parties ever repudiated the contract or refused to perform it; that nothing in the nature of rescission had occurred, and therefore that the District Judge had no power either to declare the contract to be determined or to do what he contends that judge has, in effect, done, namely, awarded to the respondent damages for the loss of his contract. There is, no doubt, considerable force in this contention; but, on the other hand one party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to refusal. The action was brought about two months after the extended time had expired. Judgment was not delivered until almost two years had elapsed from the bringing of the action—years into which was crowded a mass of angry and, to a large extent, useless litigation, by which De Pless Pol was financially crippled, and, if not absolutely ruined, was at all events rendered incapable of carrying out his side of the contemplated project, while the appellants took no adequate steps to carry out their side of it. In truth, the projects seem to have been to a great extent, if not altogether, abandoned by all the parties concerned. Having regard to the issues raised, the evidence given, and the mode in which the trial was conducted, it would appear to their Lordships that it was assumed on both sides that the District Judge should award damages down to the date of his judgment; that it was practically admitted the contemplated project would never be carried out, and that it had in effect been abandoned. On this basis the damages do not appear to be excessive; and irrespective of the point raised upon the lessors' covenant not to withhold assent to an assignment to be presently considered, their Lordships do not see any ground for disturbing the judgment of the District Judge, affirmed as it has been twice by the judgments of the Supreme Court. As to the point on the assignment, their Lordships agree with Mr. Lawrence's contention that the provision in paragraph 4 of the agreement does suggest that the contracting parties contemplated and intended that there should be in the lease some provision dealing with assignment by the lessee of his interest. Where they disagree with him is that they think section 4D is not so specific in its terms as to justify the introduction by implication into the agreement of a provision that the lease should contain a covenant by the lessee not to assign or sub-demise his interest without the consent of the lessor first had and obtained. Unless the covenant to be implied comes to that, the case would not be covered by *Eastern Telegraph Co., Ld.* v. *Dent* (1), the authority on which he relies. A forfeiture would not be worked, and the plaintiffs would not be disentitled to sue for breach of agreement. But it is quite obvious that section 4D would be quite consistent with a

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(1) [1899] 1 Q. B. 835.

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covenant by the lessee that the latter should not without consent assign the premises for a particular purpose or to a particular class of persons of whom Perianen Chetty was not one, or except upon the payment of an increased rent. The covenant by the lessor that he would not withhold his consent, except for exceptionally strong and good reasons, would be quite as applicable to each of these stipulations as to that which Mr. Lawrence presses should be implied. For these reasons their Lordships think the contention of the appellants upon this point is unsound. On the whole, they are of opinion that substantial justice has been done, that the decisions appealed from were right and should be affirmed, and this appeal be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Freeman & Cooke.*

[PRIVY COUNCIL.]

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July 20, 21;
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GRAND TRUNK PACIFIC RAILWAY COMPANY . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract—Construction—Dominion Acts 3 *Edw.* 7, *c.* 71, *and* 4 *Edw.* 7, *c.* 24.

The Dominion Government by contract with the appellants in 1903 (confirmed by 3 Edw. 7, c. 71) guaranteed to the extent of 75 per cent. of the cost of construction of a certain section of their railway the appellants' first mortgage bonds charged on their whole undertaking; the balance of cost to be raised by second mortgage bonds guaranteed by the Grand Trunk Railway Company.

By a supplemental contract in 1904 (confirmed by 4 Edw. 7, c. 24) the Government agreed to implement their guarantee so as to make the proceeds of the guaranteed bonds which had proved to be deficient equal to the said 75 per cent. of the cost of construction.

The Supreme Court held that under this contract the appellants were

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* *Present:* VISCOUNT HALDANE, LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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bound to issue additional first mortgage bonds to the extent of the deficit and that the Government should guarantee them:—

Held by their Lordships, that the appellants had no power to issue bonds other than those authorized by the original contract, and that it would be a breach of faith with the second mortgagee to do so if they could. The Government were bound to implement their guarantee by cash or its equivalent so as to discharge their liability as defined by the first contract and confirmed by the second, without imposing any further liability on the company.

APPEAL by special leave from a judgment of the Supreme Court of Canada (December 24, 1909) in answer to a reference made by Order in Council dated November 22, 1909, under s. 60 of the Supreme Court Act, as to the obligations of the appellants and respondent respectively under paragraph 5 of a supplemental contract made by them on February 5, 1904.

The original contract was made by them on July 29, 1903, shortly before the appellants were incorporated by Dominion Act 3 Edw. 7, c. 122.

The terms of the contracts are sufficiently set out in their Lordships' judgment. The respective contentions of the parties related to the mode by which paragraph 5 above mentioned provided for the implement of a guarantee given by the Government under the original contract, which had proved insufficient to answer the stipulated amount. The Government contended that it was not the intention that they should make good that deficit as their own direct and primary obligation without recourse to the company; but that they should guarantee additional bonds to be issued by the company to the extent of the deficit.

The questions referred to the Supreme Court were in effect (*a*) whether in the absence of further agreement as contemplated by paragraph 5 of the second contract the Government undertook any liability at all; (*b*) whether that liability would be satisfied by guaranteeing additional bonds of the company to an amount which will realize upon sale a sum of money equivalent to 75 per cent. of the cost of construction; or (*c*) by guaranteeing bonds to such an amount as will be sufficient to make the proceeds of all the bonds of the company so equivalent.

"(*d*) Is the Government bound upon the true construction of the said 5th clause of the agreement of 18th February 1904 to provide and pay to the company a sum of money which when added to the proceeds of the bonds of the company issued or to be issued for the cost of construction of the said Western Division and guaranteed by the Government pursuant to the authority of the said agreement of 29th July 1903 as amended by the said agreement of 18th February 1904 will aggregate a sum equal to 75 per centum of the cost of construction of the Western Division ascertained as provided in the said agreement of 29th July 1903 but not exceeding in respect of the 'Prairie' Section thirteen thousand dollars ($13,000) per mile?"

"(*f*) Is it competent to the Government and the company to agree that the implementing for the purpose of the said 5th clause shall be by way of guarantee by the Government of additional bonds of the company, and if it be so agreed, would the obligation of the Government be satisfied by the guaranteeing of such additional bonds as may be agreed upon between the Government and the company?"

The Supreme Court decided that the Government liability was of a secondary character and merely to guarantee additional bonds. It further expressed the view that until the time for payment and rate of interest of the additional and other details were agreed upon by the parties the Government obligation would not become exigible. Idington J. for himself added that he did not consider "the Crown limited absolutely to the device of bonds" to make good something which is "of necessity to be the subject-matter of the future agreement."

Sir R. Finlay, K.C., *Atkin, K.C.*, and *R. F. Spence*, for the appellants, contended that the supplemental contract did not contemplate imposing any further burden on the appellants, but imposed on the respondent the duty of making up the sum which represented the proceeds of the bonds already issued to an amount equal to 75 per cent. of the cost of construction. No provision was made in either contract for the issue of any further bonds by the company; and to do so would be a breach of faith with the Grand Trunk Railway.

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Newcombe, K.C., and *Theobald Mathew*, for the respondent, contended that the company was always intended to be primarily liable for the cost of construction and that the Government aid was confined to a secondary liability in respect of three-fourths of that cost. The 5th paragraph of the second contract provided that the guarantee should be implemented in a particular manner, not that the proceeds of the guaranteed bonds should be implemented by cash or otherwise. It was submitted that the plain intention of that paragraph was that bonds the proceeds of which should not fall below the stipulated percentage should be guaranteed. The face value of those already issued had fallen, therefore further bonds must be issued to make up the deficiency, and those further bonds must be guaranteed. The liability was to contribute by way of guarantee, not by way of cash as if the Government were a principal debtor.

Atkin, K.C., replied.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN. This is an appeal from a judgment of the Supreme Court of Canada on a reference by the Governor-General in Council asking a series of questions touching the meaning and effect of a provision contained in a supplementary agreement between the Government and the Grand Trunk Pacific Railway Company, which modified the original contract between that company and the Government.

The original contract was dated July 29, 1903. It was confirmed by the Dominion Act 3 Edw. 7, c. 71. It provided for the construction of a line of railway between the city of Monckton on the coast of New Brunswick, and the navigable waters of the Pacific Ocean. The proposed railway was to consist of two divisions, the Eastern Division extending from Monckton to Winnipeg and the Western Division from Winnipeg to Prince Rupert. The Eastern Division was to be constructed by the Government and to be Government property. The Western Division was to be constructed by the company and to belong to the company. Both divisions were to be equipped, maintained, and operated by the company. The Western Division was to

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be sub-divided into sections, the "Prairie" section and the "Mountain" section.

The 28th paragraph of the contract was in the following terms:—

"28. For the purpose of aiding the company in the construction of the Western Division the Government shall guarantee payment of the principal and interest of an issue of bonds to be made by the company for a principal amount, equal to seventy-five per centum of the cost of construction of the said division as defined and ascertained in accordance with the provisions of paragraph 18 hereof, but such principal amount shall not in any case exceed thirteen thousand dollars per mile of the mileage of the Prairie section, nor thirty thousand dollars per mile of the mileage of the Mountain section, although seventy-five per centum of such construction may have exceeded the said respective sums per mile."

The 34th paragraph provided for a guarantee by the Grand Trunk Railway of Canada of an issue of bonds by the Grand Trunk Pacific Railway Company for the balance required for the construction of the Western Division. The company was authorized to "issue a second series of bonds to be guaranteed . . . . by the Grand Trunk Railway of Canada, to be a second charge on the property described in paragraph 25 (*b*)" (meaning 35 (*b*)) "and to be subject to and rank upon the said property next after the said bonds so to be issued and guaranteed by the Government."

Paragraph 35 authorized and required the company to create the following mortgages to secure the issue of the proposed bonds:—

"(*a*) A mortgage which shall be a first charge upon the railway undertaking, equipment, and property, tolls, rights, and franchises of the company . . . . to secure the payment of the said issue of first mortgage bonds guaranteed by the Government.

"(*b*) A mortgage, which shall be a second charge upon the property covered by the mortgage provided for by paragraph 35 (*a*), save and except the rolling stock constituting the equipment of the Eastern Division, to secure the bonds to be guaranteed by the Grand Trunk Railway Company of Canada as aforesaid."

At the time when the contract of 1903 was made the market

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price of the 3 per cent. stock of the Dominion of Canada was about par; soon afterwards the price of the stock began to fall and it became apparent that the proceeds of the issue of the first mortgage bonds which were to bear interest at 3 per cent. would not amount to 75 per cent. of the cost of the construction of the Western Division.

In view of the fall in the market price of Government stock and the consequent inadequacy of the fund intended to be provided under the guarantee of Government for the construction of the Western Division a supplemental contract was made between the Government and the company. It was dated February 18, 1904, and confirmed by the Dominion Act, 4 Edw. 7, c. 24. It removed the limitation of thirty thousand dollars per mile fixed by the contract of 1903 in respect of the "Mountain" section, but retained the limitation fixed in respect of the "Prairie" section of the Western Division. It contained the following provision in paragraph 5 modifying the contract of 1903:—

"5. Notwithstanding anything in the said contract contained the Government may and shall, preserving always the proportions in the said contract provided as between the 'Prairie' and 'Mountain' sections of the Western Division, implement for the purposes and subject otherwise to the provisions of the said contract its guarantee of the bonds of the said company to be issued for the cost of construction of the said Western Division in such manner as may be agreed upon so as to make the proceeds of the said bonds so to be guaranteed a sum equal to seventy-five per centum of the cost of construction of the Western Division ascertained as provided in the said contract, but not exceeding in respect of the Prairie section thirteen thousand dollars per mile."

Paragraph 13 provided that, save as expressly provided by the supplemental contract, the original contract and each and every paragraph and provision thereof were not to be deemed to be in any way affected by the provisions of the supplemental contract.

The form of the first mortgage bonds and the form of the second mortgage bonds were afterwards settled and ratified by

Parliament, leaving, however, unaffected the liability of the Government under the supplemental contract, whatever that liability might be.

Differences having arisen as to the interpretation of paragraph 5 of the supplemental contract, it was agreed between the Government and the company that the questions at issue might be conveniently referred to the Supreme Court under the provisions of the Supreme Court Act. The Government proposed a series of questions for the consideration of the Supreme Court. The questions so proposed, which are somewhat cumbrous and diffuse, may be summed up in one simple question: Does paragraph 5 contemplate any additional liability being imposed on the company, or is it incumbent on the Government to make up the proceeds of the first mortgage bonds to their nominal or par value without recourse to the company? The Supreme Court was of opinion that the liability on the part of the Government contemplated by paragraph 5 was a secondary liability only as guarantors, that the primary liability must fall upon the company, and that it rested with the company to issue additional bonds which the Government was to guarantee.

With the utmost deference their Lordships are unable to accept the interpretation placed by the Supreme Court on paragraph 5. It seems to their Lordships that there is nothing in paragraph 5 importing that any further liability was to be imposed on the company in respect of the first mortgage bonds, and that it falls upon the Government to implement their guarantee so as to make the proceeds of those bonds issued and to be issued equal to their par or nominal value. It would be a breach of faith with the Grand Trunk Railway Company to let in any further charge in priority to their security, and as it appears to their Lordships the company has no power to issue bonds other than those authorized by the original contract.

The case was fully and ably argued on behalf of the Government. It is hardly necessary to add that the learned counsel who appeared for the Government did not argue the point which seems to be suggested in the factum of the Government that paragraph 5 is really an illusory provision, and that it is open to the Government to evade their apparent liability by refusing to come to an agreement, or abstaining from coming to an agreement, with the company.

Their Lordships therefore answer the questions proposed as follows:

Question—

a. "Yes."

b. "No."

c. "No."

d. Substantially "Yes." It is open to the Government to implement their guarantee either by a payment in cash or in any other manner which produces the same result without imposing any further liability on the company.

e. This question is already answered.

f. "No."

g. This question is already answered.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed, and that the foregoing answers should be substituted for the answers given by the Supreme Court.

Solicitors for appellants: *Batten, Proffitt & Scott.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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July 21, 27;
Nov. 2.

THE KING . . . . PLAINTIFF;

AND

IRVINE A. LOVITT AND OTHERS . . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

New Brunswick Succession Duty Act, 1896, *s.* 1 (5.)—*Construction—Locality of Simple Contract Debts—Lex loci and Administration—Lex domicilii and Distribution.*

By New Brunswick Succession Duty Act, 1896, s. 1 (5.), all property situate within the province is liable to succession duty whether the deceased was domiciled there or not; such duty being assimilated by other provisions of the same Act to a probate duty payable for local administration.

The testator, resident and domiciled in the Province of Nova Scotia, at the date of his death was possessed of $90,351 deposited in the New Brunswick branch of the Bank of British North America, the head office of which is in London; and the amount was paid to his executors after they had obtained ancillary probate in New Brunswick:—

Held, reversing the judgment of the Supreme Court, that the executors were liable to pay succession duty.

The property consisted of simple contract debts, the obligation to pay being primarily confined to the New Brunswick branch of the bank, and these debts for the purpose of legal representation, of collection, and of administration as distinguished from distribution are governed by the law of New Brunswick, where they were locally situated.

Blackwood v. *Reg.* (1882) 8 App. Cas. 82, followed.

APPEAL by special leave from a judgment of the Supreme Court (March 11, 1910) reversing a judgment of the Supreme Court of the Province of New Brunswick (April 21, 1906) on a special case submitted to that Court.

The question submitted to that Court was whether under the circumstances stated in their Lordships' judgment the respondents as executors of the estate of G. H. Lovitt, who died at Yarmouth on November 14, 1900, domiciled in Nova Scotia, were liable to pay succession duty to the Province of New Brunswick in respect of $90,351 which had been deposited by the testator in December, 1898, in the Bank of British North

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* *Present:* VISCOUNT HALDANE, LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

America at St. John, New Brunswick. The material sections of the Succession Duty Act are set out in their Lordships' judgment.

Ancillary probate of the will was granted by the Probate Court of St. John, New Brunswick, to the respondents, who thereupon obtained payment of the money deposited.

The Provincial Supreme Court decided in favour of the appellant, and thereupon $3521 were awarded as the agreed amount of duty.

The Supreme Court of Canada by a majority of four to two reversed this judgment and decided that the appellant was not entitled.

Fitzpatrick C.J. was of opinion that the amount of the bank's indebtedness to the deceased was, in the terms of the proviso to s. 5 of the Succession Duty Act, property outside of the Province of New Brunswick owned at the time of his death by a person not then domiciled within that province, and that the New Brunswick Act cannot constitutionally have effect to impose a tax upon persons domiciled and resident in Nova Scotia in respect of a succession coming to them under the laws of Nova Scotia.

Girouard J. held that the laws of New Brunswick had not imposed a succession duty upon the specific property claimed by the estate of the deceased, and that the property, being personal, was governed by the law of the domicil of the testator.

Davies and Anglin JJ. considered that the debt was that of the bank, a British corporation with its head office in London, not that of its agency in St. John, and that consequently the debt was "outside of the province" and not within it at the time of the testator's death.

Idington J., on the other hand, considered that a contract had been made within the province and had become taxable, and further that the executors having taken out ancillary probate in New Brunswick had admitted that the property was in New Brunswick.

Duff J. came "to the conclusion that the moneys in question were properly demandable only at the branch at St. John, that the Province of New Brunswick was the proper forum for the recovery and consequently the situs of the moneys deposited

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within the meaning of the Succession Duty Act"; and he held further that the executors by obtaining a grant of ancillary probate had elected to treat the moneys as assets within New Brunswick.

Sir R. Finlay, K.C., Hazell, K.C., and *Rowlatt,* for the appellant, contended that he was entitled to the succession duty as claimed. The amount deposited with the provincial bank was a debt payable at St. John and actually collected there by the respondents. It was therefore property within the meaning of the provincial Succession Duty Act, and its actual situs, consisting as it did of simple contract debts, was within the province. It was therefore liable to the duty claimed. These simple contract debts were primarily recoverable at St. John. Even if the respondents might have obtained ancillary probate and collected the amount elsewhere, they elected to obtain probate and recover the amount at St. John, and are precluded thereby from disputing their liability to pay duty, especially as the liability thereto is based upon administration. Reference was made to *Blackwood* v. *Reg.* (1); *Commissioner of Stamps* v. *Hope* (2); *Harding* v. *Commissioners of Stamps for Queensland* (3); *Attorney-General* v. *Newman.* (4) With regard to the relations subsisting between branch banks and the principal firm, see *Prince* v. *Oriental Bank Corporation* (5) and the cases there cited.

Newcombe, K.C., and *Austen-Cartmell,* for the respondents, contended that the judgment of the Supreme Court should be affirmed. The Succession Duty Act of New Brunswick, 1896, as amended by the Act c. 36 of 1897 governs the case. The statute is reproduced in New B. Consol. Stat. 1903, c. 17, but with certain variations which do not apply. It was contended that the Act of 1896 on its true construction applied to succession and not to administration. It did not impose any tax on the property in question of the testator, who died domiciled in Nova Scotia, but taxed the title of the successor. Under s. 5 it is the

(1) 8 App. Cas. 82, 92.
(2) [1891] A. C. 476.
(3) [1898] A. C. 769.
(4) (1901) 1 Ont. L. R. 511, in appeal from (1900) 31 Ont. R. 340.
(5) (1878) 3 App. Cas. 325.

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beneficiary who is made liable for the duty. Accordingly, if the situs of the property is assumed to be in New Brunswick, the actual subject of taxation was not that property, but the title of the beneficiary under the will. That title was not within the province nor did it devolve under the law of the province, and therefore could not be taxed by the provincial Legislature. They referred to *Lambe* v. *Manuel.* (1) As the succession duty claimed in this case attached only on the devolution of property, which devolution was regulated by the laws of another province, the situs of the property wherever actually situated must be deemed to be within the province by whose laws its devolution was governed and its successor claimed title. Taxation imposed on such succession, that is on the title which passed at the testator's death in respect of these deposits, was not within the province and was not direct taxation within the meaning of British North America Act, 1867, s. 92, art. 2. See also *Winans* v. *Attorney-General* (2); *Railroad Co., Cleveland, &c.* v. *Pennsylvania.* (3) Apart from the question of the succession being taxable, it was contended that the situs of these simple contract debts was not in St. John, where the bank happened to have a branch office. The debts were payable by the Bank of British North America, a corporation which had its head office in England, and for the purpose of the Bank Act (see R. S. C., 1906, c. 29, s. 7) in the city of Montreal in the Province of Quebec. The testator, moreover, was domiciled in Nova Scotia. On that account also the debts were property in Nova Scotia. They might be discharged in New Brunswick, but the bank might also discharge them at any of its branches upon surrender of the deposit receipts. So far as the locality of these debts depended on his domicil they were not subject to duties imposed by the New Brunswick Legislature. Under these circumstances it was contended that the Succession Duty Act of 1896 so far as it imposed duties as claimed was ultra vires of the Legislature as defined by s. 92 of the Act of 1867. They were not payable upon probate, and the deposits could have been collected without ancillary probate from the local Court, which was

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(1) [1903] A. C. 68.
(2) [1910] A. C. 27, 30, 33.
(3) (1872) 82 U. S. (15 Wallace) 300.

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unnecessary for the purpose of recovering the debts evidenced by the said receipts.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

Lord Robson. This is an appeal from a judgment of the Supreme Court of Canada reversing a judgment of the Supreme Court of New Brunswick. The question at issue is whether the defendants, who are the executors of the will of George H. Lovitt, deceased, are liable to pay succession duty in respect of money which the testator had placed on special deposit in the St. John (New Brunswick) branch of the Bank of British North America.

The testator in his lifetime resided at Yarmouth in the Province of Nova Scotia and was domiciled in that province. He died on November 14, 1900, being possessed of receipts for two sums, making together the sum of $90,351, deposited by him with the said branch bank. It is sufficient to set forth one of the receipts, which are identical in terms except as to amount.

"No. 2112.

"Deposit receipt.

"Incorporated. Bank of British North America. Royal Charter.

"St. John, N. B.,
"30th December, 1898.

"Received from George H. Lovitt the sum of three thousand five hundred and seventy-five dollars, and 83·100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal, and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,
"H. A. Harvey.
"Manager.

"$3575. 83, Entd. O. H. Sharp,
"Accountant.

"Not transferable."

The head office of the Bank of British North America is in London, and Mr. Harvey, who signed the receipts on behalf of the bank, was manager of the St. John's branch wherein the money was in fact deposited. On the testator's death the defendants gave the stipulated notice of withdrawal to the St. John's branch, but the manager refused to pay the money unless and until they took out ancillary probate in New Brunswick. This they did, and thereupon the manager of the St. John's branch paid the sums claimed.

By s. 92 of the British North America Act, 1867, exclusive power is given to the Legislature of each province to make laws in relation to direct taxation within the province in order to raise revenue for provincial purposes.

The plaintiff's claim for succession duty is founded mainly on s. 5, sub-s. 1, of the Succession Duty Act of New Brunswick, 1896, which enacts that "all property, whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, and subject to duty, whether the deceased person owning or entitled thereto had a fixed place of abode in or without this province at the time of his death, passing either by will or intestacy"—here follow words dealing with property voluntarily transferred for the purpose of evading succession duty—" shall be subject to a succession duty to be paid for the use of the province over and above the fees provided by the chapter of these consolidated statutes relating to probate courts," and then follow provisions fixing the amount of the duty according to the aggregate value of the property and the relationship of the successors to the deceased.

On this statute being passed a question arose as to whether a provision in such wide terms as those set forth in s. 5, sub-s. 1, was within the constitutional powers of the province, and so in 1897 the Legislature of New Brunswick added sub-s. 2 to s. 5, which at the time of the testator's death stood as follows:

"The provisions of this section are not intended to apply and shall not apply to property outside this province owned at the time of his death by a person not then having a place of residence within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province."

In the Consolidated Statutes for 1908 this sub-section appears as amended by the word "domiciled" being substituted for the words "having a place of residence."

By s. 2, sub-s. 1, of the Act the word "property" is declared to include "real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives."

Broadly stated s. 5 (sub-ss. 1 and 2) seeks to bring within the scope of succession duty—

(*a*) All property situate within the province whether the deceased was domiciled there or not;

(*b*) All property outside the province belonging to persons domiciled therein; and

(*c*) Even all property outside the province belonging to persons not domiciled therein, if such property be devised to a person resident therein.

We are here concerned only with (*a*), that is to say, the case of property said to be within the province, belonging to a person domiciled outside.

The actual situs of the property is therefore the first question to be determined.

The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be: per Lord Field in *Commissioner of Stamps* v. *Hope*. (1) The plaintiff's contention was that, on the facts of this case, the proper place for the recovery and enforcement of the debts in question was St. John, New Brunswick. The defendants, on the other hand, contend that the testator deposited his money generally in the Bank of British North America, wherever situate, and that it was repayable, certainly in London, where the bank had its headquarters, and probably even at any of its branches.

According to the defendants' contention the bank in London might be called on at any time by a person of whom it would probably know nothing, and with only a very limited time in which to obtain the detailed information that would be necessary from the St. John's branch, to pay $90,351 in London without

(1) [1891] A. C. 476.

any deduction for cost of transmission or any agreement as to the rate of exchange. No such obligation appears by express words or necessary implication in the contract of the parties, and it is very improbable that it was ever contemplated or intended by them. It is true that the money was to be "accounted for by the Bank of British North America," but when the circumstances are considered it is seen that those words mean only that the bank is to account for the money as being money payable by them or their agents at St. John. Thus, if the manager of the St. John's branch refused payment, or if the branch itself were closed, the bank in London would, of course, be liable as a principal, but that fact does not affect the locality of the debt as originally fixed by the parties.

Although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business they may be regarded as distinct trading bodies. Thus, it was held in *Woodland* v. *Fear* (1) that the obligation of a bank to pay the cheques of a customer rested primarily on the branch at which he kept his account, and that the bank in that case had rightfully refused to cash the cheque at another branch. Commenting on that decision, Sir Montague Smith, in delivering the judgment of their Lordships' Board in *Prince* v. *Oriental Bank Corporation* (2), points out that it would be difficult for a bank to carry on its business by means of branches on any other footing, because the officials at one branch do not know the state of a man's account at another branch.

Similarly (as Lord Campbell points out in *Woodland* v. *Fear* (1)) the case of *Clode* v. *Bayley* (3) shews that different branches of the same establishment may be indorsers from one to the other, and that, in case of dishonour, notice need not be given direct to the principal establishment, but that each branch in succession is entitled to notice.

In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localized its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch. The present case comes well within the principles thus laid down, and their Lordships are of opinion that these debts were "property situate within the province" of New Brunswick.

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(1) (1857) 7 E. & B. 519.

(2) 3 App. Cas. 325.

(3) (1843) 12 M. & W. 51.

The defendants, however, contended that the situation of the property is to be determined, not by its actual locality, but according to the principle expressed in the maxim "Mobilia sequuntur personam." Personal property of a movable nature is considered, they say, to follow the person of the owner and is, in contemplation of law, situate wherever he is domiciled. In this view the property was neither in London nor New Brunswick, but in Nova Scotia.

It is necessary, therefore, to examine somewhat closely the sense in which movables are said to "follow the owner." It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator's domicil, for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its "following the owner" so as to be theoretically situate elsewhere will avail them. The case of legacy and succession duties, however, has been placed by our law on a different footing.

In construing the statutes relating to those duties, our Courts have laid it down that the very general terms in which they are expressed must receive some limitation. Their language is wide enough to include all property and every person everywhere, whether subjects of this kingdom or not, and no matter where they are domiciled. It has accordingly been held, through a long series of cases, that the duties are intended to be imposed only on those who become entitled by virtue of our law. The effect of this principle is to exempt from the payment of legacy or succession duties movable property situate here which belonged to a testator domiciled abroad, for in dealing with the distribution of such property our Courts act not on our own law, but on the law of the domicil of the testator or intestate on which the legatee or successor founds his tittle. Similarly in the case of movables situate abroad which belonged to a person domiciled here our Courts will direct their distribution according to our law and not that of the locality where they are found. In *Blackwood* v. *Reg.* (1) Sir Arthur Hobhouse, in delivering the judgment of their Lordships' Board, says: "For the purpose of succession and enjoyment, the law of the domicile governs the foreign personal assets. For the purpose of legal representation of collection and of administration as distinguished from distribution among the successors they are governed not by the law of the owner's domicile but by the law of their own locality."

When, therefore, it is said that "Mobilia sequuntur personam" all that is meant is that for certain limited purposes we deal with "mobilia" (or leave them to be dealt with) under the law governing their owner as though they were situate in his country instead of ours, and, in return, foreign countries generally do the like with regard to English movables situate abroad.

The principle or practice thus defined is considered just and expedient as between nations, and our Courts give it full effect in the construction of taxing statutes both English and Colonial, but its application may be excluded by the use of apt and clear words in a statute for the purpose. The question now to be determined is whether that has been done in the present case by a Legislature having full authority in that behalf.

The same point, on substantially the same provision, came up for consideration by their Lordships' Board in the case of *Harding* v. *Commissioners of Stamps for Queensland.* (2) In that case it was held that s. 4 of the Queensland Succession Duty Act, 1892 (which was identical with s. 2 of the English Succession Duty Act, 1853), must be read in the sense affixed to the English Act by the English tribunals, and that it did not include movables locally situate in Queensland which belonged to a testator whose domicil was in Victoria. The testator had died in 1894, when the Queensland Act of 1892 was still operative, but in 1895 that Legislature amended the Act of 1892 by declaring that upon the issue of any grant of probate succession duty was chargeable in respect of all property within Queensland though the testator might not have had his domicil there. Lord Hobhouse, in delivering the judgment of the Board, said that if this amendment were retrospective it would be conclusive in favour of the

(1) 8 App. Cas. 93. (2) [1898] A. C. 769.

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Commissioners who were claiming the duty. This weighty opinion is precisely in point as regards the present case. Here the Legislature of New Brunswick has expressly enacted that all property situate in the province shall be subject to a succession duty though the testator may have had his fixed place of abode or domicil outside the province. The Act purports to exclude the application of the maxim "Mobilia sequuntur personam" as regards personal estate within the province belonging to persons domiciled elsewhere, but to retain it as regards the property of New Brunswick citizens situate outside the province.

The defendants next say that even assuming the physical property, out of which the tax was to be paid, be taken as situate in New Brunswick, and not at the place of the owner's domicil, yet the true subject-matter of the tax was not that property, but the succession or title which accrued to the successor under the testator's will by virtue of the law of the testator's domicil. In that view the tax was laid on something not "within the province" and so was beyond the competence of the local Legislature. On the basis of this contention the local Legislature might tax the actual property, namely, the money comprised in the receipts, to any extent it pleased, but must not call the tax a succession duty nor regulate its amount by reference to the relationship between the testator and the successor, or it would become a tax, not on the physical property, but on a succession taking place outside the province. The defendants, in this connection, cited the case of *Lambe* v. *Manuel* (1), where it was held that the taxes imposed on movable property by the Quebec Succession Duty Act, 1892, applied only to property claimed by virtue of Quebec law, and had no application to property forming part of a succession devolving under the law of Ontario. That case, however, turned expressly on the construction of the particular statute, which was not phrased so as to qualify the application of the principle "Mobilia sequuntur personam." It was drawn in the general and unrestricted terms which the Courts have said must be read as subject to the limitation expressed by that principle. The case of *Harding* v. *Commissioners of Stamps for Queensland* (2) was before their Lordships

(1) [1903] A. C. 68.

(2) [1898] A. C. 769.

in that case, and was cited in their judgment without any disapproval of the opinion there expressed that a Colonial Legislature may, if so minded, impose a succession duty on property within their province though such property devolved under the law of another domicil.

Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute made its payment a term of the grant of ancillary probate. By s. 6 the executor is required to give a bond for its due payment, and if he fails to do so the probate granted to him is cancelled. He is directed to deduct the duty before handing over the property (s. 15); to pay it forthwith to the Receiver-General of the province (s. 17); and if a foreign executor transfers the stock of any company in the province liable to duty, on which the duty has not been paid, he is to pay it, and the company permitting such transfer shall also become liable.

These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

It is obvious that such an enactment may work with unexpected effect upon creditors and others who in the ordinary course of business have allowed their money or personal property to remain in a New Brunswick bank, or in the hands of a New Brunswick trader, without reflecting that, on their death, it would become subject to taxation of an amount so entirely disproportionate to the protection it may have received, perhaps only for a few days, from the New Brunswick law. Instead of the exemption from succession duty which the foreign recipient of personal estate ordinarily enjoys, by the comity of nations, in such cases, the duty in this case is even doubled against him. By s. 5, sub-s. 6, the duty is doubled where the money or personal property in New Brunswick belonging, say, to a Nova Scotian "goes to any person residing out of the province," as, for instance, to its owner's relatives in Nova Scotia. And the tax is

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on the gross sum, though it may be money used in trade, and, as such, be subject to many deductions before it can fairly be treated as net property. So far as it is net property it would be again subject to succession duty in Nova Scotia on its transfer to that province. But these are considerations rather for the New Brunswick Legislature than for the Law Courts, and though the Courts will not easily adopt a construction leading to such results, yet, if the language of the statute is explicit, effect must be given to it.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the order of the Supreme Court of Canada set aside with costs, and the order of the Supreme Court of New Brunswick restored.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Field, Emery, Roscoe & Medley.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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July 25;
Nov. 2.

THE GRAND TRUNK PACIFIC RAILWAY COMPANY . . . . APPELLANTS;

AND

THE LANDOWNERS ON STREETS IN FORT WILLIAM, FORT WILLIAM LAND INVESTMENT COMPANY AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Dominion Railway Act, 1906, *ss.* 47, 159, 237 (3.)—*Power of Board of Railway Commissioners—Construction—Condition as to Compensation ultra vires—Order approving Location of Railway rescinded.*

Under s. 159 of the Railway Act of 1906 the Board of Railway Commissioners ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants

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* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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shall "make full compensation to all persons interested for all damage sustained by reason" thereof:—

Held, that the order must be rescinded. Under s. 237 (3.) the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location; and as the condition failed there was no approval.

APPEAL by special leave from a judgment of the Supreme Court (June 15, 1910).

The Board of Railway Commissioners on October 6, 1909, in pursuance of powers vested in them by the Railway Act, R. S. C., 1906, c. 37, ordered that the appellant company might construct its line of railway along certain streets through the city of Fort William notwithstanding the strong objections thereto of the respondents that it would be injurious to their properties which abutted on the said streets. The order was made subject to the express condition stated in their Lordships' judgment and the above head-note.

The appellant company appealed to the Supreme Court for a declaration that to impose the condition was beyond the jurisdiction of the Board, and that the order of the Board should be upheld as unconditional.

The Supreme Court held that the condition was within the jurisdiction of the Court to impose.

Sect. 47 of the Railway Act relates to the conditions which the Board may impose and is as follows:

"The Board may direct in any order that such order or any portion or provision thereof, shall come into force, at a future time, or upon the happening of any contingency, event or condition in such order specified, or upon the performance to the satisfaction of the Board, or person named by it, of any terms which the Board may impose upon any party interested, and the Board may direct that the whole or any portion of such order, shall have force for a limited time, or until the happening of a specified event."

Sir R. Finlay, K.C., *Atkin, K.C.*, and *G. F. Spence*, for the appellants, contended that the Board had no power to impose the condition in question, that it was separable from the rest of the order and ought to be separated. The terms of s. 47 are so

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general that the section must be read in connection with the specific provisions of the Act relating to compensation. It should be read together with ss. 235 and 237, and the power to order compensation is limited to the matters specifically referred to in those sections, and could not be arbitrarily extended so as to include compensation not specifically authorized by statute. There was no power to extend compensation from cases arising in consequence of the construction of a railway to those arising from its location. In regard to the imposition of a condition improperly, see *Rex* v. *Dodds*. (1) It was contended that the condition should be struck out as ultra vires, and that the appellants were entitled to treat the order as valid and to act upon it as if no such condition were imposed.

J. S. Ewart, K.C., for the respondents the Fort William Land Investment Company, contended that s. 47 on its true construction authorized the Board to impose the condition contained in its order; otherwise it had implied authority to frame its order as it thought right. The Board in considering whether a proper location should or should not be approved must in the proper exercise of its discretion take into account all the circumstances, including the effect on the owners of abutting lands, and must judicially determine whether it should impose any and what conditions on which its approval should be granted. Approval is refused except subject to conditions expressed. There is no jurisdiction to reverse that order, and still less to uphold it, while striking out the condition which was a vital part thereof. The matter was entirely within the discretion of the Board, and if the terms on which it was exercised are disapproved, the order, which was inseparable from the condition, should be rescinded.

Atkin, K.C., replied.

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Nov. 2.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Supreme Court of Canada dated June 15, 1910. That judgment dismissed an appeal from an order of the Board of Railway Commissioners for Canada, which order was made on October 6, 1909.

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(1) [1905] 2 K. B. 41.

The facts giving rise to the question before their Lordships may be stated in a word. The Grand Trunk Pacific Railway Company constructed a branch line to the town of Fort William, in the Province of Ontario, and in order to "establish and maintain its terminals and other works in connection therewith" it entered into an agreement with the corporation of that town on March 29, 1905. By the agreement the corporation granted to the railway company "free of cost and all liability the right to build on the level and operate in perpetuity a double track line of railway on all the streets of the municipal corporation coloured red" on a certain plan. Two of those streets were Empire Avenue and McKellar or Hardisty Street. The railway company then applied, under s. 159 of the Railway Act of 1906, for approval of the location of its line of railway. On October 6, 1909, the Board of Railway Commissioners ordered that "subject to the terms and conditions contained in the said agreements, and subject to the condition that the applicant company shall do as little damage as possible and make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street in" Fort William, the location "be and the same is hereby approved." The true question in this case is whether it was within the powers of the Board of Railway Commissioners to impose the "condition" that the company should make full compensation to all persons interested for all damage sustained by reason of the location of the railway. On the one hand, the railway company maintains that it was ultra vires of the Board to impose the condition, and presents the argument that the condition should be deleted and that the order quoad ultra should stand. While, upon the other hand, the respondents in the appeal maintain that it was within the power of the Board to make a condition of compensation of the kind in question; but they plead that, if this was not so, then the order—never having been, or been intended to be, an unconditional order—should fall, if the condition fails.

These respondents are frontagers, that is to say, owners of properties in the streets named, and it is not difficult to understand how they are, and possibly also how the municipality itself is, seriously affected by the location of the railway as proposed and sanctioned. It appears, however, that many of the properties in question are neither taken nor injuriously affected in the sense of the English railway law as interpreted by *The Hammersmith, &c. Ry. Co.* v. *Brand* (1), a decision which has been followed in Canada (*In re Devlin and the Hamilton and Lake Erie Ry. Co.* (2)). It is in no way surprising to find that the Board, giving a sanction for the construction of a railway through the municipality, should make the condition that the compensation to be paid for that privilege should fully equate with the injury done "to all persons interested"; that is to say, that the compensation should be recoverable in respect not only of the construction of the railway as settled by *Brand's Case* (1), but also for all damage sustained in respect of its "location."

The real question, however, is whether, under the 47th section of the Railway Act of 1906, the Board was vested with a power of widening the scope of the compensation provided for in the statute itself. The language of s. 47 gives power to the Board to direct that its order shall come into force, inter alia, upon the performance "of any terms which the Board may impose upon any party interested." This language is certainly general and comprehensive; but, in their Lordships' view, it cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the railway company. The particular application now being dealt with falls within the scope of s. 237, which applies to "any application for leave to construct the railway upon, along, or across an existing highway." By sub-s. 3 of that section it is provided that when the application is of that character "all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land exclusive of the highway crossing required for the proper carrying out of any order made by the Board." It does not appear to their Lordships that it would be safe to infer from the generality and comprehensiveness of the powers of the

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(1) (1869) L. R. 4 H. L. 171.
(2) (1876) 40 Upper Canada Q. B. Rep. 160.

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Board, and apart from any specific reference to the compensation itself and the parties entitled thereto, that these provisions of s. 237 were liable to be altered, abrogated, or enlarged by the exercise of the Board's administrative power under s. 47.

The reasons above referred to, which might induce administrative action so as to make the compensation properly equate with the injury to all interests, are reasons which might or might not appear sufficient for direct legislative interposition, but, as already mentioned, their Lordships, apart from that, cannot interpose by the inference argued for. On the contrary it appears to them that the administrative action taken was beyond the powers of the Board of Railway Commissioners for Canada, under the law as it stood at the date of the order.

On the other hand, their Lordships are unable to give any countenance to the proposition that an order thus pronounced, subject to a condition in itself neither unnatural nor unreasonable, but erroneously inferred to be within the Board's powers, should be treated by the method of striking the condition out and leaving the order as an unconditional order to stand. Nobody meant that. The point is not advanced by the use of language as to whether this was a condition precedent or was not, the truth of the matter being pretty clear, namely, that had the Board been faced with the situation that it was not within its power to give protection to all the real interests which, in its opinion, were subject to injury by the location of the railway at the streets mentioned, the Board could have adopted either of two other courses open. These were : (1.) of either declining to sanction the location applied for, or (2.) of intimating that they would only sanction the location if steps were taken to make a deviation or detour,—s. 159 (3.) providing for the case of sanction of a deviation of not more than one mile. To put the Board, which had these options before it, in the position of having unconditionally approved of the location of the railway along the streets named, and to do so by writing out the condition which appears upon the face of the order, appear, in their Lordships' judgment, to be neither fair to the Board itself, nor to the municipality, nor to the interests concerned. The order itself, and not the mere condition, must fall,

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and the parties will be left to come to a fresh arrangement under a new application and according to the circumstances, legislative and otherwise, at its date.

Their Lordships will humbly advise His Majesty that the judgment appealed from be reversed, and that the order of the Board of date October 6, 1909, be rescinded, the decisions as to costs in the Courts below to stand, but there being no order as to costs in the present appeal.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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1911
Nov. 23, 24;
Dec. 14.

CHARLES EDWARD VICTOR SENEVIRATNE COREA . . . . } PLAINTIFF;

AND

MAHATANTRIGEY ISERIS APPUHAMY AND ANOTHER . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Limitation Ordinance, 1871, *s.* 3—*Possession by Coparcener presumed to be for the Joint Benefit—Exclusive Possession must be proved to be adverse.*

Before 3 & 4 Will. 4, c. 27, s. 12, it was the rule of English law that possession by one coparcener was possession by the others. Such is now the law of Ceylon, which by its Limitation Ordinance, 1871, s. 3, further provides that the possession relied on by a defendant must be a title adverse to or independent of that of the plaintiff.

Where one of four coparceners by descent entered on possession of the property in suit in 1878 and settled the same on his son in 1907:—

Held, in a suit for partition by the assignee of the other coparceners, that the defendant's possession, unless there was clear evidence to the contrary, must be referred to the title by descent and enured for the benefit of his co-heirs.

Thomas v. *Thomas* (1855) 2 K. & J. 79, approved.

APPEAL from a judgment (August 26, 1909) of the Supreme Court affirming that of the District Court of Chilaw (August 15, 1909).

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* *Present:* LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

On April 14, 1908, the appellant sued for partition of certain lands in which he claimed as purchaser to be interested as co-owner with the respondent Iseris Appuhamy, who had with his three sisters succeeded thereto as heirs of their brother Elias, who died on July 23, 1878. It appeared that on January 26, 1907, the first respondent Iseris donated the lands to his son, the second respondent, reserving to himself a life interest therein; and that on December 5, 1907, the surviving sister of Elias and her nieces sold their interests in the lands in suit to the appellant, who thereupon claimed to be entitled to a two-thirds share thereof.

The first respondent, besides denying the appellant's title, pleaded that he as the sole heir of Elias entered into possession and had been in undisturbed possession for a period of ten years by a title adverse to and independent of the appellant and all others, and relied upon s. 3 of Ordinance 22 of 1871.

The District Judge held that the first respondent had acquired title by prescription, as he had entered on possession in his character of sole heir or plunderer, whichever it was, and had acknowledged no title in any one else. He considered that the law of prescription in Ceylon is that one co-heir so long as he possesses property precariously on a derivative or dependent title cannot prescribe against the co-heirs. If he sets up an adverse title and by overt acts to the knowledge of his co-heirs defies their title and disclaims the precarious character of his possession and thereafter has the uninterrupted possession on such adverse title for ten years without payment of rent or other acknowledgment of their collateral title, he will thereby acquire a good prescriptive title. The burden lay on the appellant to prove that the possession relied on in this case was throughout of a precarious or permissive character and had not been discharged. The Supreme Court dissented from the opinion that when it was once proved that the first respondent had had de facto possession for more than ten years the burden lay upon the appellant to prove that it began or went on in a precarious or permissive character. It, however, approved the finding of the District Judge that the evidence established the intention of the first respondent to enter as owner in his own right, that his possession

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was unaccompanied by any act from which an acknowledgment of a right in any other person could fairly and naturally be inferred, and that his possession became accordingly adverse at once, and continued so up to the date of the action.

P. O. Lawrence, K.C., Dornhorst, K.C., and *Barrington-Ward*, for the appellant, contended that on the evidence the first respondent's possession was throughout permissive and precarious and was held as co-owner on behalf of himself and his co-owners. In Ceylon a co-owner cannot acquire a title to land by prescription against the other co-owners. They referred to Ordinance 22 of 1871, ss. 2 and 3. The English Act 3 & 4 Will. 4, c. 27, which by s. 12 dealt with co-owners' rights, did not apply to Ceylon. The English law before that section and Ceylon law recognized that possession by one coparcener was possession by all. The strongest evidence should be given of a distinct claim by the defendant to hold adversely to his co-heirs persisted in to their knowledge. He must shew that he held by a title adverse to and independent of the plaintiff. Reference was made to Darby and Bosanquet's Law of Limitation, 2nd ed., p. 377; *Culley* v. *Doe* d. *Taylerson* (1); a judgment of Bonser C.J. in an unnamed case (2); *Punchibale* v. *Ram Menika* (3); *Amereseckere* v. *Ram Menika*. (4)

Atherley-Jones, K.C., and *Horace Miller*, for the first respondent, Iseris Appuhamy, contended that the evidence proved that he had been in undisputed possession for more than the statutory period ut dominus and without any acknowledgment direct or indirect of a title under which the appellant could claim. He entered into possession as sole heir to Elias and by a long series of acts known to the appellant's vendors exercised all the rights of sole and beneficial owner during the whole period of his possession, which lasted for about thirty years. Evidence of actual ouster or its equivalent was not necessary; if it were it might be presumed from the conduct of the parties. They referred to *Naguda Marikar* v. *Mohammadu* (5)

(1) (1840) 11 Ad. & E. 1008.

(2) (1899) Koch's Rep. 61, 62.

(3) (1878) 1 Ceylon S. C. R. 64.

(4) (1897) 3 Ceylon N. L. R. 137.

(5) (1903) 7 Ceylon N. L. R. 91.

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and *Terunnanse* v. *Menike*. (1) It was contended that the law of Ceylon was analogous to the English law as laid down in 3 & 4 Will. 4, c. 27, s. 12, and reference was made to *Hobbs* v. *Wade*. (2)

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

1911
Dec. 14.

LORD MACNAGHTEN. This seems to be a very plain case.

The action out of which the appeal has arisen was an action for partition of certain lands, part of the estate of one Elias Appuhamy of Galmuruwa, in the district of Chilaw.

Elias died in July, 1878. He was never married and he died intestate. His heirs were his brother Iseris and three sisters. Taking by descent the heirs took as tenants in common in accordance with the provisions of s. 18 of the Partition Ordinance of 1863.

Elias came originally from Baddegama, in Galle district, about 120 miles from Chilaw. His father and mother and the rest of his family lived there apparently in somewhat humble circumstances. Elias prospered in Chilaw. After a time he was joined by his brother Iseris, who says that he left home alone when he was ten years old, though he was probably three or four years older at the time. The two brothers kept a shop or store in Chilaw, in which they seem to have been jointly interested. But it is admitted that the lands in question in this action were the separate property of Elias.

At the time when Elias died Iseris was in gaol under sentence of imprisonment for assault and robbery.

The property being thus left derelict, possession was taken by officials of the District Court. It must be presumed that such possession was taken for the benefit of the persons rightfully entitled.

Iseris came out of gaol in December, 1878. Thereupon, or soon afterwards, he entered into possession of the intestate's lands. The circumstances under which the officials of the Court relinquished possession in his favour do not appear in evidence. It seems, however, to be immaterial whether there was an order of the Court on the subject, or whether the officials who must have known who Iseris was, and must have been aware of his relationship to the intestate, retired in his favour without any specific directions. The trial judge says that they were "ejected" by Iseris, but no statement or suggestion to that effect is to be found in the evidence.

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(1) (1895) 1 Ceylon N. L. R. 200.

(2) (1887) 36 Ch. D. 553.

Some time after the death of Elias two of his sisters made their way to Chilaw. They seem to have been kindly treated by Iseris, who gave them small sums of money from time to time, and allowed them to obtain provisions from his shop without payment. Indeed, one of the sisters named Balohamy lived for a long time in a house on Medawatta, which was one of the plots or parcels of land belonging to Elias and part of his estate.

In 1907 Iseris by deed settled the intestate's land on his son, reserving a life estate. This action on the part of Iseris was the talk of the neighbourhood. Balohamy, who was then the only survivor of the three sisters, became alarmed. Lawyers were consulted. Under their advice Balohamy brought an action for partition against Iseris. The action was confined to Medawatta, on the score, it was said, of expense, in order to save the stamp or fee which would have been payable if the whole estate had been the subject of the action. Then Iseris turned her out of her home. Being without means, Balohamy and other co-proprietors in the same interest sold their rights or claims to the plaintiff Corea, who was Balohamy's legal adviser and advocate. He brought this action against Iseris. Iseris' son was afterwards made a party to the action.

Iseris in his defence claimed the benefit of Ordinance No. 22 of 1871, entitled "An Ordinance to amend the laws regulating the prescription of actions."

It is not disputed that by that Ordinance, or by an earlier Ordinance of 1834 which was repealed by the Ordinance of 1871, the old law was swept away. The whole law of limitation is now contained in the Ordinance of 1871.

Sect. 3 enacts that "proof of the undisturbed and uninterrupted possession by a defendant in any action . . . . of lands or immovable property by a title adverse to or independent of that of the claimant or plaintiff in such action . . . . for ten years previous to the bringing of such action shall entitle the defendant to a decree in his favour with costs." The section explains what is meant by undisturbed and uninterrupted possession. It is "possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred." Then follows an analogous provision in favour of a plaintiff claiming to be quieted in possession of lands or other immovable property under similar circumstances.

In the present action the plaintiff Corea offered some evidence tending to prove that Iseris took out administration to Elias. There certainly was a testamentary case in the District Court relating to the intestate's estate. But the record of the case is missing, and it is not clear whether the case was concerned with an application by officials of the Court or with an application by Iseris for administration. The District Judge held that it was not proved that Iseris took out administration to his brother's estate.

The plaintiff also endeavoured to prove that Iseris had acknowledged the title of his co-proprietors within ten years of the commencement of the action. On this point, also, the District Judge was against the plaintiff.

Their Lordships accept the decision of the District Judge on these two points. In their Lordships' opinion they are not material to the real question at issue. Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, the question remains, Has he given proof, as he was bound to do, of adverse or independent title? His title certainly was not independent. The title was common to Iseris and to his three sisters. On the death of Elias, his heirs had unity of title as well as unity of possession. Then comes the question, Was the possession of Iseris adverse? The District Judge held that Iseris "entered in the character of sole heir or plunderer." "Whichever it was," says the learned judge, "so he continued, and acknowledged no title in any one else. He has acquired a good prescriptive title." It is difficult to understand why it should be suggested that Iseris may have entered as "plunderer." He was not without his faults. He is described by the learned judge, who decided in his favour, as "a convicted forger and thief," and "expert not only in crime and incarceration but also in perjury." But it is perhaps going too far to hold that he was so fond of crooked ways and so bent on doing wrong that he may have scorned to take advantage of a good legal title and may have preferred to masquerade as a robber or a bandit and to drive away the officers of the Court in that character. It is not a likely story. But would such conduct, were it conceivable, have profited him? Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors. The principle recognized by Wood V.-C. in *Thomas* v. *Thomas* (1) holds good: "Possession is never considered adverse if it can be referred to a lawful title."

The two learned judges in the Court of Appeal did not adopt in its entirety the suggestion of the trial judge. They both held that Iseris entered as "sole heir," and that his title has been adverse ever since he entered. They held that he entered as "sole heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. There is no provision in the Ordinance of 1871 analogous to the enactment contained in s. 12 of the Statute of Limitations, 3 & 4 Will. 4, c. 27, which makes the title of persons "entitled as coparceners joint tenants or tenants in common" separate from the date of entry. Before that Act was passed it was a settled rule of law that the possession of any one of such persons was the possession of the other or others of the co-proprietors. It was not disputed at the Bar that such is now the law in Ceylon.

The learned counsel for the respondent, who argued the case with perfect candour, and said all that could be said on behalf of his client, did not, of course, question the principle on which Wood V.-C. relied in *Thomas* v. *Thomas*. (1) His submission was that the Court might presume from Iseris' long-continued possession, undisturbed and uninterrupted as it was, that there had been an ouster or something equivalent to ouster. No doubt in former times before the statute of William IV., when the justice of the case seemed to require it, juries were sometimes directed that they might presume an ouster. But in the present case the learned judge did not make any presumption of that sort. Nor, indeed, did Iseris before this action was brought attempt to rely on adverse possession. His pretence was that he was sole heir. In the first partition action he swore that he did not know the name of his father or that of his mother. He swore that Balohamy was only a cousin; he knew nothing, he said, about his family except that he was the only brother of Elias. For this audacious statement he was indicted for perjury at the instance of the judge. He was convicted and sentenced to fine and imprisonment. The judge who pronounced sentence observed, "It is clear that he was determined to prove that he was the sole heir, and strenuously to deny anything that might count against him." Be that as it may, this is not a case in which the circumstances could justify the presumption of ouster in favour of such a man as Iseris.

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(1) 2 K. & J. 79, 83.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court and the judgment of the District Judge set aside, with costs in both Courts, and a decree made for partition of the lands which on the death of Elias passed by descent to his heirs. The respondents will pay the costs of the appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondent: *Surridge & Mullis.*

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(1) 2 K. & J. 79, 83.

[HOUSE OF LORDS.]

H. L. (E.)
1911
May 5.

OWNERS OF SHIP SWANSEA VALE . . . APPELLANTS;

AND

JESSIE MARY RICE AND MILLICENT RICE (AN INFANT) . . . . RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Seaman on Duty on Watch—Unexplained Disappearance—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The unexplained disappearance from a ship at sea of a seaman on duty as officer of the watch:—

Held a sufficient ground for inferring that he accidentally fell overboard and met his death by accident arising out of his employment within the meaning of the Workmen's Compensation Act, 1906.

EMPLOYERS' appeal from an order of the Court of Appeal affirming an award made by the judge of the Swansea County Court under the Workmen's Compensation Act, 1906.

The respondents were the widow and daughter of William Rice, who at the time of his death was employed as first mate on board the appellants' steamship *Swansea Vale*. On June 28, 1909, the *Swansea Vale* sailed from Greenock for Algiers on her maiden voyage. On June 30, at 4 A.M., Rice complained to the captain of giddiness and on the captain's advice took a dose of castor oil. He then went on deck for the purpose of keeping his watch. He would have to be on duty from 4 A.M to 8 A.M., and in the performance of his duty he would be sometimes on the bridge and sometimes on deck superintending the work of the watch. There were three other members of the crew on deck during the watch. The weather was fair but hazy and the sea calm. Rice was seen on the bridge about 7 A.M. by the members of the watch, but was never seen afterwards. The respondents filed a request for arbitration, claiming compensation on the ground that the deceased lost his life by accident arising out of and in the course of his employment in that he had fallen overboard and was drowned while on watch at sea.

The county court judge came to the conclusion that the deceased accidentally fell overboard and that the accident arose out of and in the course of his employment; and he made an award in favour of the respondents (the applicants). This award was affirmed by the Court of Appeal by a majority (Cozens-Hardy M.R., and Fletcher Moulton L.J., Buckley L.J. dissenting).

Atkin, K.C., and *L. M. Richards*, for the appellants. The respondents have not discharged the onus which lay upon them of proving that the deceased was killed by an accident arising out of his employment, but the matter rests upon conjecture only: *Bender* v. *Owners of Steamship Zent* (1); *Marshall* v. *Owners of S.S. Wild Rose* (2); *Barnabas* v. *Bersham Colliery Co.* (3)

D. Villiers Meager and *R. C. Ollivant*, for the respondents. This case is distinguishable from *Bender* v. *Owners of Steamship Zent* (1) and *Marshall* v. *Owners of S.S. Wild Rose* (2) by the fact that the deceased was on duty on deck at the time when he met his death. There was sufficient evidence to justify the finding of the county court judge: *Wicks* v. *Dowell* (4); *Mackinnon* v. *Miller* (5); *Grant* v. *Glasgow and South Western Ry. Co.* (6)

Atkin, K.C., replied.

LORD LOREBURN L.C. My Lords, I am glad that the learned counsel who addressed to your Lordships such a concise and admirable argument recognized the true value of decided cases in connection with an argument like this. Cases are valuable in so far as they contain principles of law. They are also of use to shew the way in which judges regard facts. In that case they are only used as illustrations. What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other. In the present case employment on board ship necessarily exposed this unfortunate man to the danger of falling overboard. We have knowledge of certain things. He was on board ship in the course of his employment, and the accident, if it were one, happened in the course of his employment. Unquestionably

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(1) [1909] 2 K. B. 41.
(2) [1910] A. C. 486.
(3) (1910) 103 L. T. 513.
(4) [1905] 2 K. B. 225.
(5) 1909 S. C. 373.
(6) (1907) 45 Sc. L. R. 128.

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he fell overboard in one way or another. That is obvious. Under these circumstances, if you exclude the possibility of suicide or murder, it must have been an accidental falling overboard, and there was an injury by accident in the course of his employment. Was it an injury by accident arising out of his employment? We know that this man at an early hour complained of being sick and giddy. He was on deck discharging a responsible office at the very time he disappeared from the ship. It is natural to suppose that he might have been at the side of the ship for the exact purpose of his duty. It was possible also that he might have been there because he was seized with a feeling of sickness. If he fell overboard, as undoubtedly he did, by slipping or losing his balance, while at the side discharging some duty,—looking out, for example, or anything of that kind—that would be an injury by accident arising out of and in the course of his employment. If he was taken giddy while at the side, or if, taken by nausea, he went to the side to vomit, that also would be the same. He might have been going to examine the lifeboat. Any of these things would afford a possible and not improbable explanation of what happened. The other alternatives were suicide or murder. If you weigh the probabilities one way or the other, the probabilities are far greater that this man perished through an accident arising out of and in the course of his employment. I am certain that the county court judge was entitled to come to this conclusion. Under the circumstances I agree with the opinion of the Court of Appeal. I think that this appeal ought to be dismissed with costs.

LORD ASHBOURNE. My Lords, I agree. I think on the facts that there was ample warrant for the county court judge to arrive at the conclusion at which he did arrive that this man met with his death by accident arising out of and in the course of his employment. Here was a man of experience, of good character, with everything to make him careful, in charge of a new ship, the principal officer beginning his watch and requiring to have his eyes about him. He was there without any suggestion of suicide or any criminal act on the part of others which could have led him into danger or difficulty. He went on his watch not feeling well, but with an attack of giddiness. Is it a strong presumption to reach the conclusion that it must have been by some accident that a man of this character met his death by falling into the sea? It is impossible to measure the facts of one case by the facts of another, but I have no difficulty in arriving at the conclusion that this appeal should be dismissed with costs.

LORD ALVERSTONE. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I tender my assent to the proposition that it is impossible in all cases of precedent or alleged precedent to go by analogy of facts. Few cases arise in ordinary life, or in the Law Courts, in which such analogy is complete, and unless it is complete it must lead to dangerous conclusions. In the case of *Marshall* v. *Owners of S.S. Wild Rose* (1) I specially reserved the case of a sailor whose life is sacrificed under circumstances of mystery. This case, however, appears to me to raise no difficulty with regard to the distinction between inference in the ordinary sense and mere conjecture. The facts are simple. A man engaged in a variety of duties is sent in a sick and giddy condition to perform those duties and into a position of danger. It appears to me to be an entirely fair and reasonable inference to make that he met his death by accident. I see no occasion to differ from, but much to incline me to agree with, the judgment in the case of *Mackinnon* v. *Miller* (2), and in particular with the judgment of Lord Dunedin.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, May 5, 1911.

Solicitors for appellants: *Botterell & Roche, for William Cox, Swansea.*

Solicitors for respondents: *John T. Lewis, for Llewelyn Howell & Williams, Swansea.*

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(1) [1910] A. C. 486.

(2) 1909 S. C. 373.

[HOUSE OF LORDS.]

H. L. (E.) TAYLOR . . . . APPELLANT;

1912

AND

Feb. 19.

LONDON AND NORTH WESTERN RAILWAY COMPANY . . . . RESPONDENTS.

Employer and Workman—Compensation—Registered Agreement—Termination of Weekly Payment—Suspensory Order—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16.

A county court judge has no jurisdiction under the Workmen's Compensation Act, 1906, to terminate an agreement for compensation, but where he is satisfied that the incapacity resulting from the injury has finally disappeared he may finally end the weekly payment provided by the agreement.

The county court judge may also make a suspensory order either by ordering that the weekly payment shall be ended until further order or by reducing the weekly payment to a nominal amount.

Per Lord Atkinson: An agreement whereby the employer agrees to pay the workman a given sum per week as compensation, to continue until the same shall be ended, diminished, increased, or redeemed in pursuance of the Act, and the workman agrees to accept such payment in full discharge of the liability of the employer to pay compensation under the Act, is in accordance with the terms of the Act.

APPEAL from an order of the Court of Appeal affirming an award made by the late judge of the Bloomsbury County Court under the Workmen's Compensation Act, 1906.

On February 12, 1909, the appellant, who was a brakesman in the employment of the respondents, while working on the line at Stechford, was knocked down by a wagon and fell on his chin, which he cut, and received a blow on the back of his head from the couplings of the wagon. The respondents admitted their liability to pay compensation, and on March 3, 1909, the following agreement was come to between the appellant and the respondents:—"(1.) The employer agrees to pay the workman the sum of sixteen shillings and five pence per week in compensation for the said injuries, such weekly payments to commence from the time of the said accident and to continue until the same shall be ended diminished increased or redeemed in pursuance of the said Act. (2.) The workman agrees to accept such payment in full discharge of the liability

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of the employer to pay compensation under the provisions of the Workmen's Compensation Act, 1906." Weekly payments were made under this agreement up to March 13, 1909. On that date the appellant returned to work at full wages, and he remained at work until January 24, 1910. He was then incapacitated by an attack of influenza which was followed by neurasthenia, with the result that the appellant did not return to work until May 2, 1910. In the meantime the appellant applied for registration of the agreement of March 3, 1909, and on May 9, 1910, the deputy county court judge ordered that the agreement should be registered with a stay of execution till further order, without prejudice to an application by the respondents to review the weekly payment. The respondents then applied for a review and termination or diminution of the weekly payment as from March 13, 1909, on the ground that the appellant's incapacity for work resulting from the injury had ceased as and from that date. The application was opposed by the appellant.

The county court judge found as a fact that the symptoms of neurasthenia from which the appellant was suffering between January and May, 1910, were to be attributed solely to the attack of influenza and not to the accident, and adjudged that the agreement "be hereby terminated as from the 13th day of March, 1909." The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) affirmed the order and award of the county court judge upon the ground that though in form it was an order for the termination of the agreement, which it was contended was beyond the jurisdiction of the Court, in substance it was an order for the termination of the weekly payment in accordance with the statute.

1911. Nov. 6. *J. Sankey, K.C.*, and *Edmond Browne* (*Dawbarn Young* with them), for the appellant. The county court judge had no jurisdiction to terminate the agreement, and he ought to have made his award in such a form as to preserve the right of the workman to compensation in case of a recurrence of his incapacity. The agreement of March 3, 1909, is ultra vires because it prohibits the workman from taking fresh proceedings in that event. The Act provides for payment of compensation during incapacity and there is nothing in the Act to cut down that provision. That is a lifelong liability which can only be got rid of in one way, namely, by redemption under the Act. It is impossible to contract out of the Act except by means of a registered scheme, and no agreement can preclude a workman from making a fresh application for compensation if the incapacity recurs. It is essential to the validity of this agreement that a suspensory clause should have been inserted. The Court of Appeal thought themselves bound by *Nicholson* v. *Piper*. (1) The county court judge has no power to make an award in a form which deprives the workman of the benefits conferred on him by the Act.

Mordaunt Snagge, for the respondents. There is here no question of contracting out. The appellant's argument involves that there must be a suspensory order in every case, but paragraph 16 of the First Schedule empowers the Court to say, in a case where in the opinion of the Court the incapacity has absolutely ceased, that the liability to compensation shall cease also. *Nicholson* v. *Piper* (1) shews that the duration of compensation is within the jurisdiction of the Court. This agreement is in accordance with sub-s. 3 of s. 1 of the Act, and having regard to the terms of the agreement and to *Nicholson* v. *Piper* (1) the right to compensation has determined. The agreement follows the language used in the form of award given in Form 24 in the Appendix to the Workmen's Compensation Rules, 1907-9. Ever since the Act of 1897 there has been jurisdiction to terminate compensation, and the authorities shew that the county court judge may also make a suspensory award: see *Irons* v. *Davis & Timmins, Ld.* (2); *Chandler* v. *Smith* (3); *Owners of the Vessel Tynron* v. *Morgan* (4); though this has been doubted by the Scots Courts: *Husband* v. *Campbell* (5); *Singer Manufacturing Co.* v. *Clelland* (6); but he is not bound to do so in every case.

Sankey, K.C., replied.

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(1) [1907] A. C. 215.
(2) [1899] 2 Q. B. 330.
(3) [1899] 2 Q. B. 506.
(4) [1909] 2 K. B. 66.
(5) (1903) 5 F. 1146.
(6) (1905) 42 Sc. L. R. 757.

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The House took time for consideration.

1912. Feb. 19. EARL LOREBURN L.C. My Lords, I have had the advantage of reading in print the judgment of my noble and learned friend Lord Atkinson, and I agree with him that in this case the order made by the county court judge is technically erroneous, because his jurisdiction was merely to say that the weekly payment should be "ended, diminished, or increased," whereas he has ordered that the agreement be terminated.

It is obvious, however, that according to the decision of this House in *Nicholson* v. *Piper* (1) the county court judge might have in effect terminated the agreement finally by making an order that the weekly payment should be ended. He meant to end the payment but put the judgment in the wrong form.

We are bound by the decision in *Nicholson* v. *Piper*. (1) It is thus settled that when a county court judge is satisfied that the incapacity resulting from an injury has finally disappeared he can so adjudge and thereby finally end the weekly payment beyond revival. This may be attended with hardship if in any case the incapacity should in fact return contrary to the anticipation of the county court judge. Under paragraph 1 (*b*) of the First Schedule the weekly payment is to be "during the incapacity," and it might possibly happen that a man entitled under the Act would find himself barred by an order to end the weekly payment made under an erroneous expectation.

I do not think there is anything in the decision of *Nicholson* v. *Piper* (1) which prevents the county court judge from adjudging that the weekly payment be ended until further order. The same result is, we are told, attained by a practice of ordering a merely nominal payment in order to keep the question alive. In my view either of these methods may be lawfully adopted. An ending of payment may be either temporary or permanent.

It seems hardly worth while to refer this case back to the county court judge in order that he may put his decision in strict form, because there is no doubt about the substance of his decision. But if the appellant desires it I think this ought to be done. It ought not, however, to affect the costs, being merely a formal point.

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(1) [1907] A. C. 215.

LORD ATKINSON. My Lords, the main proposition for which the appellant in this case contends is, as I understand it, this: that when in exercise of the jurisdiction conferred by paragraph 16 of Sched. I. attached to the Workmen's Compensation Act, 1906, the county court judge or arbitrator orders that the weekly sums payable to a workman, whether under an award or registered agreement, by way of compensation for incapacity caused by accidental injury should be "ended," he is bound to make this order merely suspensory, no matter how convinced he may be that the incapacity of the workman will never recur, or how overwhelming may be the evidence leading him to that conclusion.

The reason given for the adoption of such a course was that there cannot be any certainty in such cases that incapacity may not recur, and that unless the order be made suspensory the liability of the employer would not be kept alive, and the workman would thus be shut out from receiving compensation should he unfortunately, as a result of the injury received, be again incapacitated. It was further contended that the provision contained in the agreement entered into between the employer and workman in this case and duly registered, to the effect that the workman accepts the weekly payment therein mentioned until it shall be "ended, diminished, increased, or redeemed" in pursuance of the Workmen's Compensation Act, 1906, in full discharge of the employer's liability to pay compensation under that Act, is prohibited by the statute itself and is therefore illegal and void.

It was not contended on behalf of the respondents, and could not, I think, be successfully contended, that the county court judge or arbitrator may not have jurisdiction in a case where, upon the evidence, he is of opinion that incapacity may probably recur to keep alive the liability of the employers, either by a suspensory order such as the appellant insists he should have made in the present case, or by an order to reduce the weekly

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payment to a nominal sum or by some other device. What was insisted upon on their behalf on this point was that where that judge is of opinion that the incapacity will most probably never recur, and there is ample evidence, as there admittedly was in this case, to support that conclusion, he is not bound to make an order keeping the liability alive; that it is not the law that the liability of the employer must during the whole life of the workman be necessarily kept alive, and that there may, while he is still living, be a final settlement of the workman's claims otherwise than by redemption of his weekly payments. It was further contended on behalf of the respondents that the provision already mentioned in the agreement of March 3, 1909, was not illegal or void.

For the purposes of this case, however, it would, but for a preliminary point hereafter dealt with, only have been necessary to consider whether the first and second of the appellant's contentions, or possibly the first alone, are sustainable. In my opinion both contentions are, for reasons which I shall give presently, unsound. I think there was no imperative obligation on the county court judge, on the facts of this case, to make a suspensory order to the effect contended for, and I further think that the agreement of March 3, 1909, did not contravene any of the provisions of the statute of 1906, and that it was, therefore, neither illegal nor void. The preliminary point is raised upon the form of the order of the county court judge dated June 23, 1910. The portion of it dealing with the agreement runs as follows:

"It is adjudged that the agreement dated the 3rd day of March, 1909, and made between the applicants of the one part, and the respondent of the other part, be hereby terminated, as from the 13th day of March, 1909."

It is contended that the county court judge had only jurisdiction under paragraph 16 of the schedule to declare that the weekly payments which the employer by this agreement bound himself to pay should be "ended," not that the agreement itself should terminate. I think that contention is, strictly speaking, sound. The words of the paragraph are of general application. They apply to payments made under a valid award, as well as

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under a binding agreement enforceable under Sched. II., paragraph 9, when registered, as a judgment of a county court.

It was urged that it was decided in your Lordships' House in *Nicholson* v. *Piper* (1) that the county court judge had jurisdiction to decide that such an agreement as this should terminate. On an examination of the facts of that case, however, it will be found that this is not so. The order in that case was made under paragraph 12 of Sched. I. of the Workmen's Compensation Act of 1897. This paragraph is identical in its terms with paragraph 16, under which the order in the present case purports to have been made; but the order in that case differed essentially from the order made in this case in this, that it provided that the weekly payments should end as well as that the agreement should terminate. It ran thus:

"I order that the agreement come to between John Francis Nicholson, the workman, and James Richard Piper, the employer, on the 1st day of February, 1904, and duly recorded in this Court on the 2nd day of December, 1904, be this day terminated, and that the weekly payments to the workman thereunder be ended accordingly."

The then Master of the Rolls, the late Lord Collins, in the following passage of his judgment, reported on p. 38 of the record lodged in this House, dealt with the form of this order thus. He said: "Therefore the order of the learned county court judge did, in effect, do what the 12th section of the First Schedule provides for: it ended the payment. He in terms ordered that the weekly payments thereunder be ended. It is true he also purported to terminate the agreement. It does not seem to me that that makes any difference in the order. It is obvious that what he meant was that the agreement should cease to operate, and he then did what he meant throughout to do—he ordered that the payments should be terminated." The other members of the Court of Appeal, Cozens-Hardy and Farwell L.JJ., apparently concurred in that view of the meaning and sufficiency of the order, since it contained the vital direction, omitted in the order in the present case, that the weekly payments should be ended, and was therefore a judicial determination of the

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(1) [1907] A. C. 215.

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particular matter which the county court judge was expressly empowered to decide; and further that it was not vitiated or rendered void or illegal by the unauthorized addition terminating the agreement. It is plain from the judgment of Lord Halsbury in your Lordships' House that he took the same view. What was decided, therefore, unanimously by the Court of Appeal and by this House in *Nicholson* v. *Piper* (1) was, not that an agreement such as that entered into in the present case could be terminated by an order of a county court judge made under paragraph 12 of the First Schedule of the Act of 1897, but that such an order as was made in that case was a final adjudication on the claims of the workman for compensation which could not be reopened or reviewed. The Master of the Rolls said (at p. 32 of the record): "It seems to me perfectly clear what the Act of Parliament meant to do, namely, to allow the measure of compensation to be ascertained, if possible, by agreement subject to certain limitations imposed by the Act itself, and, failing agreement, the county court judge was to ascertain, not only the amount of the weekly payment, but on proper application made to him to determine whether in the altered condition of things it should be 'ended,' diminished, or increased. Therefore it was within the jurisdiction of the county court judge to determine these matters, and the workman is in the same position as if the matter had been left to be determined by the county court judge himself as to the amount or duration of the compensation."

Farwell L.J. is reported, at p. 40 of the record, to have expressed himself thus: "When clause 12 of the First Schedule speaks of 'ended' it means ended, particularly when it is contrasted with 'diminished' and 'increased,' and it means a final end, so that the whole matter may be terminated. If Mr. Shearman is right there could be no end, however much the learned county court judge desired to put an end to the arbitration. If the parties arrive at the amount of compensation by agreement then clause 12 of Sched. I. brings in the county court judge as arbitrator between them. If the amount of compensation is not agreed" (I presume the word "upon" is omitted) "he awards the amount as arbitrator, and when he has proceeded under

(1) [1907] A. C. 215.

clause 12 and has ended the matter, his functions are ended also and he has no longer any jurisdiction."

Now this was the decision appealed against. It clearly amounted, in my view, to a decision that the ending of the weekly payments which the county court judge was empowered to order was not an ending pro hac vice, but a final ending, terminating at once and for ever the liability of the employer to pay compensation, and terminating similarly the correlative right of the workman to receive it. It was contended on behalf of the appellant on the hearing of that appeal, as it has been contended on behalf of the appellant on the hearing of the present appeal, that there was no finality except death; that the workman having established the liability of the employer, the right of compensation survived; that though the payments may under such an order cease on the apparent ending of the incapacity, the liability, on the recurrence of incapacity, is not brought to an end; and that the order of the county court judge terminating the agreement was void, as being in excess of jurisdiction. But the point decided was not that an order merely terminating the agreement was valid, nor yet that the county court judge had merely jurisdiction, under paragraph 12, to order that the weekly payments should be temporarily suspended; but the substantial point that he had jurisdiction to declare that these payments should be ended for all time, and that, as I have already said, the liability of the employer to pay and the correlative right of the workman to receive these payments should both cease altogether. It is, I think, only necessary to read the judgments to see that this was so. I was a party to that decision, though I did not deliver a separate judgment. It was in this sense that I understood it; and so understanding it I was of opinion then, as I am now, that it was absolutely right. But, whether right or wrong, it is, being a decision of this House, binding, and must be taken to have settled the law.

If it be the law, then the first contention of the appellant in the present case is, necessarily, unsound and erroneous—because that contention is founded upon the supposition that the county court judge has no jurisdiction under paragraph 16 to decide that the weekly payments should finally cease.

For the purposes of the decision of this appeal it is unnecessary to consider the second question raised by the appellant, namely, the question of the legality of the second provision of the agreement of March 3, 1909, to the effect that "the workman agrees to accept such payment in full discharge of the liability of the employer to pay compensation under the provisions of the Workmen's Compensation Act, 1906"; but as the matter may be of some importance, I think it well to deal with it.

The argument to shew that this provision is illegal appears to me to confound the imposition by the statute of liability with the discharge of it. It is quite true that by the combined operation of s. 1, sub-s. 1, of the statute, and paragraph 1 (*b*) of Sched. I., a liability is imposed upon the employer to pay, where death does not ensue, a weekly payment, not exceeding the amount specified, during incapacity; but, notwithstanding that provision, the amount or *duration* of the compensation, i.e., the duration of the weekly payments, may be settled either by agreement or by arbitration. If the arbitrator, when convinced that recovery is complete, can order that the payments shall finally cease, as it is decided he can, what possible illegality can there be in the parties contracting that the payments made up to the time he shall so decide shall be received by the workman in full satisfaction of his claims? The agreement deprives him of nothing. It only binds him to take in satisfaction the payments up to the time the arbitrator deprives him of them. He could not get the payment longer if it had been fixed by a regular award. In addition, Sched. I., paragraph 15, shews that the workman's fitness for employment may be determined by agreement, paragraph 16 that the amount of the payment on review may also be settled by agreement, paragraph 17 that the amount of the lump sum payable on redemption may be so fixed, and paragraph 9 of the Second Schedule of the Act enacts that "where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement," &c.

In the face of these provisions, which contemplate settlements of all these things by agreement, it seems to me impossible to contend that a clause such as that contained in this agreement is void or illegal, providing, as it merely does, that the weekly payment fixed by the agreement, if paid until the arbitrator decides the workman is no longer entitled to receive it, shall be accepted in discharge of the employer's liability.

On the main and substantial questions raised I therefore think that this appeal fails. On the narrow technical question as to the form of the order I think the appellant is right, unless that order can be read as if it directed that the performance of the agreement should cease, i.e., the weekly payments should be ended. I doubt if it can be so read, though I have no doubt that the county court judge intended in this case, as in *Nicholson* v. *Piper* (1), to decide that the payment under the agreement, not the agreement itself, should terminate. I presume the county court judge has power, or would have power if the matter were referred back to him, to amend his order, and the appellant might possibly not care for a decision in his favour on this technical point. On the point of form, however, I think the appeal well founded.

I have to say that my noble and learned friend Lord Mersey desires me to say that he concurs with this judgment.

LORD SHAW OF DUNFERMLINE. My Lords, I think that when the learned county court judge decreed that the agreement be terminated, it was meant by him, and is the natural implication of his adjudication, that the payment of compensation was ended. As, however, your Lordships think that the omission of a statement to the latter effect is an informality requiring to be cured, I agree that, if the appellant so wishes, the case may be remitted to have this done.

On the merits, I agree that it was competent to the judge to end the compensation for ever. That, in my view, is settled by *Nicholson* v. *Piper*. (1)

But I am of opinion that the words "ended, diminished or increased" include not merely ending the compensation for ever, but ending it for a time. The language and meaning of the Act are to the effect that compensation is to be made for and during the incapacity. Cases may easily be figured in which the capacity for work may, for a time, return, and then incapacity may again recur. A careful prognosis may indicate a certain periodicity of illness, with intervals of fitness for work; or it may suggest such an uncertainty of a continuance of health as to cloud the workman's whole future with peril. These are just the cases in which the county court judge may feel bound to end the payment, not for ever, but for a time.

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(1) [1907] A. C. 215.

In the fear, apparently, of the word "ended" being more literally construed, the course has been sometimes taken of a nominal payment being adjudged so as to preserve a form of continuity, and, so to speak, to keep open the compensation account. This course is intelligible. I do not, any more than did Lord Halsbury in *Nicholson's Case* (1), say that it is incompetent. But, in my opinion, it is unnecessary. In the cases referred to, the simple course is, according to my view, to make the payment end until further order.

I respectfully agree to the judgment proposed.

Sankey, K.C., for the appellant, stated that he did not desire that the case should be remitted, and the appeal was accordingly dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 19, 1912.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *C. de J. Andrewes.*

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(1) [1907] A. C. 215.

[HOUSE OF LORDS.]

H. L. (E.)
1911
June 26.

MOSS STEAMSHIP COMPANY, LIMITED . APPELLANTS;

AND

WHINNEY . . . . RESPONDENT.

Company—Debenture-holders' Action—Receiver and Manager—Powers—Ship—Bill of Lading—Lien for previously unsatisfied Freight—Shipment by Receiver—Unsatisfied Freight due from Company—Right to exercise Lien as against Receiver.

By an order made in a debenture-holders' action the plaintiff, A. W., was appointed receiver and manager of the business of Ind, Coope & Co., Limited, a brewery company, and he carried on the business of the company as before. By a letter signed "Ind Coope & Co., Limited, by A. W., receiver and manager," the defendants were instructed to carry to Malta a quantity of beer consigned to the company c/o the company's agents at Malta. The defendants carried the beer to Malta under a bill of lading which named the company as the consignees and provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight "due either from shippers or consignees to the shipowner." The defendants for many years had carried beer for the company to Malta under bills of lading in this form, and they claimed a lien on the beer in question for certain unsatisfied freight due to them from the company before the plaintiff's appointment:—

Held (Lord Shaw of Dunfermline and Lord Mersey dissenting), that the defendants were not entitled to a lien for arrears of freight, because in truth the plaintiff and not the company was both shipper and consignee, and notice of this fact was conveyed to the defendants by the form of the shipping instructions; and by Lord Atkinson, on the further ground that the plaintiff had no power, without the leave of the Court, to create such a lien.

Decision of the Court of Appeal [1910] 2 K. B. 813, affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Hamilton J. (1)

The appellants, who owned a line of steamships trading between Liverpool and Malta, had for many years carried beer shipped by Ind, Coope & Co., Limited, brewers, of Burton-on-Trent, and consigned to the company care of Turnbull Junior & Somerville, their selling agents at Malta.

The respondent, Arthur F. Whinney, by an order of the Court, dated January 5, 1909, and made in a debenture-holders' action, was appointed receiver and manager of the business of Ind, Coope & Co., and by a further order, dated January 15, was continued as such receiver and manager. The respondent carried on the business of the company as before.

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(1) [1910] 2 K. B. 813.

On January 2 and January 9, 1909, Ind, Coope & Co. received orders from their agents at Malta for supplies of beer for the purpose of selling on the company's behalf. Accordingly on January 13 the company's export manager sent shipping instructions to James Moss & Co., the appellants' agents, as follows:

> "Please deliver ale as below, charging to yours respectfully
> "Ind, Coope & Co., Limited,
> "By Arthur F. Whinney,
> "Receiver and manager, C. C. C."

(C. C. C. being the initials of the export manager). Then followed the marks and descriptions of the ale, and the consignees were stated to be "Ind Coope & Co., Limited, care of Turnbull Junior & Somerville, Strada Reale, Valetta, Malta." These shipping instructions were in the usual form except for the signature of the respondent and his description as receiver and manager.

On January 16 James Moss & Co. replied as follows:—

> "Messrs. Ind Coope & Co.
> "Burton-on-Trent.
>
> "Sirs,—We beg to enclose herein shipping documents for your goods forwarded according to your instructions per '*Rameses*' for Malta. We place to your debit the amount of our expenses thereon as per statement at foot.
>
> "Yours faithfully
> "James Moss & Co.
>
> "Note.—One bill of lading sent to consignee. Please check the enclosed bills of lading and if found incorrect return to us immediately as otherwise we can take no responsibility."

Then followed description and marks and statement of the freight and expenses amounting to 56*l.* 13*s.* 7*d.* The bill of lading, which was in the form regularly used by the appellants, was, so far as material, as follows: "Received from James

Moss & Co. of Liverpool as agents for shipment upon the steamship '*Rameses*,' now lying in the port of Liverpool and bound for Malta, 832 packages of merchandise, marked and numbered as per margin, to be delivered subject to the conditions hereinafter mentioned at the port of Malta unto Messrs. Ind Coope & Co., Limited, c/o Messrs. Turnbull Junior & Somerville or to his or their assigns."

Clause 3 provided that the shipowner should have a lien on the goods shipped not only for the freight and charges due thereon, but also for "any previously unsatisfied freight . . . . and other charges due either from shippers or consignees to the shipowner."

While the goods were in transit James Moss & Co. applied to Ind, Coope & Co. for payment of their account for freight amounting to 228*l.* 13*s.* 5*d.*, of which 56*l.* 13*s.* 7*d.* was in respect of the above consignment and the balance of 171*l.* 19*s.* 10*d.* was in respect of previous consignments by the company to Malta, the freight and charges on which remained unpaid. The respondent refused to pay the latter item, and thereupon the appellants threatened to enforce the lien which they alleged was conferred on them by the bill of lading in respect of the whole account. Ultimately the respondent paid the full amount upon the appellants' undertaking to deliver the goods at Malta immediately and to refund the 171*l.* 19*s.* 10*d.* if it was subsequently found that they were liable therefor. The respondent then brought this action for the return of that sum.

Hamilton J. held that the appellants were entitled to the lien which they claimed and were not bound to refund the money, but his judgment was reversed by the Court of Appeal by a majority, Vaughan Williams and Buckley L.JJ., Fletcher Moulton L.J. dissenting.

The arguments on both sides are so fully set out in the report of the case before the Court of Appeal that it is unnecessary to repeat them here.

1911. Feb. 13, 14. *Bailhache, K.C.*, and *Robertson Dunlop*, for the appellants.

Sir Alfred Cripps, K.C., and *D. C. Leck*, for the respondent.

The House took time for consideration.

June 26. Lord Loreburn L.C. In this case Fletcher Moulton L.J. and Hamilton J. were of one opinion, while Vaughan Williams and Buckley L.JJ. held a different view. Your Lordships have, I am sure, felt the difficulty presented by such a conflict of judicial authority. This is eminently one of those cases in which it is most important to appreciate the true business character of the transaction and to examine the communications between the parties in that light. Messrs. Ind, Coope & Co. had for some time shipped beer on the vessels of the Moss Steamship Company, and taken bills of lading which provided that the shipowner should have a lien on the goods not only for the stipulated freight, but also for any unsatisfied freight due on other shipments either from shipper or consignee to the shipowner. That was the course of business between them up to January, 1909.

On January 5 an order was made in a debenture-holders' action that Mr. Whinney should be receiver and manager of Ind, Coope & Co. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, of which the entire conduct passed into the hands of Mr. Whinney. Mr. Whinney did not close down the business, but continued it, and, among other things, he resolved to send some of Ind, Coope & Co.'s beer to Malta, to the company's representatives there.

Accordingly on January 13 he sent an order to the Moss Steamship Company directing them to ship the beer to Ind, Coope & Co., c/o Turnbull Junior & Somerville of Malta, and he signed as follows: "Ind, Coope & Co., Limited, by Arthur F. Whinney, Receiver and Manager." Upon this, Messrs. James Moss & Co., as agents, shipped the beer, and made out the bill of lading in the terms theretofore in use, which, as I have said, gave to the shippers a contractual lien, not merely for the freight of 56*l.* payable for this particular beer, but also for any unsatisfied freight due, either from shipper or consignee.

Now there was at that time due from Ind, Coope & Co. to the shipowner the sum of 171*l.* for unsatisfied freight, and the dispute which your Lordships have to decide is this: Can Mr. Whinney claim delivery of this beer on payment of the stipulated freight of 56*l.*, or must he also pay the additional 171*l.*, unsatisfied freight, due upon earlier contracts from Ind, Coope & Co. in accordance with the lien clause in the bill of lading? Obviously, if the lien holds good for this sum of 171*l.*, the effect of what Mr. Whinney has done is this: he has given security to the unsecured creditors of Ind, Coope & Co., which placed them in front of the debenture-holders, after the latter had got a receiver appointed, in order to realize their floating security over the undertaking of Ind, Coope & Co.

Questions have been raised as to the power of a receiver and manager to hypothecate assets of the company for payment of unsecured creditors. It is said that such a proceeding would be ultra vires, or, at all events, an excess of authority, of which a trader who knew the position could not avail himself. I do not think such a question arises in the present case for the reason stated by Mr. Bailhache. This is an action between the shipowners on the one side and Mr. Whinney on the other. If Mr. Whinney has contracted so to hypothecate these goods, I say if he has done so, he cannot himself compel the shipowners to deliver them without first satisfying the charge which he has created. As between the litigating parties there is a charge. It may be that Mr. Whinney had no power to create it, but if so, then it is for the company to claim the goods and to raise the question of his authority. Of course, a decision upon the ground so taken by Mr. Bailhache would really settle nothing as to the true rights of the shipowners.

In my opinion there is another ground upon which this case ought to be decided in favour of the respondent. The shipowners can claim a lien of the sum of 171*l.* unsatisfied freight only if this unsatisfied freight was due by the shippers or consignees of this particular shipment of beer. Who were the shippers and consignees respectively? We must look at the order of January 13 and the bill of lading together. The order is signed Ind, Coope & Co., by Mr. Whinney, receiver and manager. Unless qualified by other circumstances absent here, this means that Mr. Whinney ordered the shipment and contract for it on his personal credit, looking, of course, for indemnity to the assets of the company of which he is receiver and manager. He is the shipper in the name, it is true, of Ind, Coope & Co. The shipowners know from the terms of the order, or ought to know, that Ind, Coope & Co. no longer are conducting the business, but that Mr. Whinney is conducting it and making contracts for it. So again, when in the bill of lading Ind, Coope & Co. are named as consignees, the shipowners know that they are so only in name, the real consignee being the same as the real shipper, namely, Mr. Whinney, the receiver and manager.

I agree with Fletcher Moulton L.J. that the company was still alive and its business was being still carried on by Mr. Whinney, but he was not carrying on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. No doubt there may be cases in which a receiver and manager is in all senses the agent of the company, and a question may then arise as to the extent of his authority. But here he was not such agent, and this was sufficiently conveyed to the shipowners by the notice that he was receiver and manager. Had they doubted or desired further information they could have asked for it before contracting to carry the goods. They would have found that the person contracting with them was Mr. Whinney.

Accordingly, I move your Lordships that the order appealed from be sustained.

Earl of Halsbury. My Lords, I think, for more reasons than one, that it is desirable to state the circumstances under which this case comes for adjudication, chiefly because the very sensible arrangement made by the parties to have the real question in dispute disposed of before our Courts might be defeated if questions of pleading or forms of action should interfere with the determination of the real question as I think it has interfered with the arguments. Another reason is that I think that, if the appellants' argument should succeed, it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets.

Now in this case a joint stock company, Ind, Coope & Co., Limited, a brewery carrying on an extensive business, part of which consisted in exporting beer, &c., to Malta, became embarrassed in its affairs, the debenture-holders became alarmed, and such an application as I have described was made in the Chancery Division on January 5, 1909, and on that day an order was made appointing Mr. Whinney, the respondent, receiver and manager. On January 13 an order was given by Mr. Whinney for the beer which is the subject of this action, but the order was signed by "Arthur F. Whinney, Receiver and Manager," and on the 16th shipping documents were sent from Moss & Co. with a note that one bill of lading had been sent to the consignee by the ship *Rameses*. The exact date of when she started on her voyage is not given. Two bills of lading were issued, one stamped, the other an unstamped copy sent to Ind, Coope & Co., Limited, Burton-on-Trent.

No one has suggested that Mr. Whinney ever saw the bill of lading himself; indeed, Hamilton J. finds that that form of bill of lading was probably not read by anybody. The letter of January 16, which enclosed it, bore the statement "One bill of lading sent to consignee. Please check the enclosed bill of lading, and if found incorrect, return to us immediately, as otherwise we can take no responsibility." That is a warning and request that the bill of lading should be checked. I am satisfied that it has no reference whatever to the terms of the bill of lading, and that it only meant matters to be filled in pursuant to the instructions of January 13, but that included the description of the consignee and the address of the consignee, and I assume that to that extent the bill of lading was duly checked, and certainly no exception taken. No doubt Mr. Whinney did not read the bill of lading; it is not proved that he did not, but I think I should be shutting my eyes to the ordinary course of business if I believed that he had. This is certainly what I should infer, and when the witness at the trial is challenged with this notice of the 16th, he says, that of course had reference to the number of the casks.

Now, if actual knowledge of this particular stipulation in this particular bill of lading is negatived, as I think it is here, I am unable to take the view, with all respect to this very learned and experienced judge, and my respect for any judgment of his is very great indeed, that there was any evidence of such a contract as would enable Messrs. Moss & Co. to exercise a lien.

Such a phrase as "the usual bill of lading" is entirely misleading unless it is explained with respect to whom the word "usual" is to be applied. No doubt there are some things which are so common in commerce that, even when not specially called to the attention of the contracting parties, they would be assumed by every business man to be included in a common and well-known form of contract, but no one, I should have thought, could contend that, when a company has been so altered in its management that a receiver has been appointed who is the only person who can contract, its former course of business is to be considered as rendering the very first consignment made after the appointment of the receiver subject to the forms which were in use when the company and not the receiver was conducting the business.

It would be quite intelligible that such a clause as we are here discussing should be included in dealings with the company itself, and the practice would be justly used as proof against those who had been in the habit of using it for ten years. But once a receiver and manager is appointed things are changed, and every man of business would know, or ought to know, that the only person with whom he could safely contract would be the manager appointed by the Court. Now to say of such a person that the stipulation in question would form a likely clause would be ridiculous.

Earl of Halsbury.

If it were to be inserted at all, it certainly would require that it should be expressly pointed out to the receiver and manager, who, as every business man would know, is placed in his position of receiver and manager to protect the rights of the debenture-holders. One would suppose, from some of the arguments, that one was dealing here with some very inexperienced persons, who had never heard of a debenture action before, whereas, as I have already pointed out, we are dealing with thoroughly experienced business men, and I observed when Mr. Waller is challenged at the trial whether he had not heard of a manager and receiver being appointed, his only answer is that he had not been officially informed.

As the late Lush L.J. pointed out, a bill of lading primarily refers to legal relations between the parties as applicable to the particular consignment to which it relates.

The question what would be the consequence if Mr. Whinney had known and understood the contract, which he was supposed to have done but which I find as a fact he did not, does not arise in this case. I agree with the Lord Chancellor that it is unnecessary to discuss it, and I think that this appeal should be dismissed with costs.

Lord Atkinson. My Lords, the action out of which this appeal has arisen was not an action to recover damages for breach of a warranty given by Arthur F. Whinney of his authority to make a contract, still less an action to recover damages for a false representation made by him of his authority to make any contract. It was a proceeding instituted by him to try the validity, as between himself and the appellants, of a lien given to them, and already enforced by them, on certain goods of which he had possession, the property of Ind, Coope & Co., shipped on the appellants' ship the *Rameses*, and carried by her to Malta. The lien was given in respect of a simple contract debt, owed by Ind, Coope & Co., for freights theretofore earned, and in the circumstances of this case must, I think, be taken prima facie to have had the effect of giving to an unsecured creditor of that company priority over its secured creditors.

Arthur F. Whinney was, by an order of the Court dated

January 5, 1909, made in an action instituted by the debenture-holders of this company, appointed receiver and manager over "all the undertaking and property whatsoever and wheresoever of the company," the company being directed to deliver over to him, amongst other things, "all the stock in trade and effects of" their business, and the possession of the said properties, so far as was necessary for the purposes of such receivership and managership; and it was further ordered that Whinney should forthwith, out of any assets coming to his hands, pay the debts of the company, which had "priority over the claims of the debenture stock holders, under the preferential payments in Bankruptcy Amendment Act, 1897, and be allowed all such payments on his account."

It is not pretended that the debt due for back freights, for which the lien was given, was one of these latter, or that any order had been obtained from the Court authorizing the giving of the lien, and I do not think that it can be successfully contended that under this order Whinney had any power to give any lien, valid at law against everybody, on assets of the company coming to his hands, part of its stock in trade, which would have the effect of giving the priority above mentioned.

This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

Of all these facts the appellants had notice before this lien was sought to be created. That notice was conveyed to them by the description given by Whinney of himself in his letter to them of January 13, 1909. He describes himself as receiver and manager of Ind, Coope & Co. That is sufficient: *Burt, Boulton & Hayward* v. *Bull.* (1)

(1) [1895] 1 Q. B. 276, 281.

Now, as I understood, the appellants contended that, despite this notice, Whinney could enter into a contract with the appellants, valid and binding as between themselves, that the company could do that which at law it is disabled from doing, and that he himself, Whinney, could also do something which at law he is also disabled from doing—namely, that the company should intermeddle with their own goods, that they should become the consignees, if not the shippers, of these goods, should exercise dominion over and deal with them in the character of consignees, and that he, Whinney, could, in defiance of the order of the Court, give a valid lien over part of the stock in trade of the company, of which he got possession and control as such receiver and manager, in respect of a simple contract debt, in the manner and with the result above mentioned; and, further, that the lien so given could be enforced, and the receiver be estopped, as it were, in a suit such as this, from relying upon its invalidity.

It is admitted on both sides that the bill of lading is only evidence of the contract entered into between the shipowner and the shipper, not the complete contract in itself. It is further admitted that it must be construed together with the respondent's letter of January 13, 1909. It is not denied that the bill of lading is similar in form to those invariably or generally used by the appellants in their business as shipowners, but there is no evidence which I can discover, either that its terms were specifically brought to the knowledge of Whinney, or that he was under any necessity or pressure to ship this beer by the *Rameses*, or by any other of the appellants' ships, or indeed to ship it at all. It is not, therefore, in my opinion, open to the appellants to contend that there was some object to be gained by shipping the goods by this ship, or by the appellants' line, so important in character that it would have been but reasonable and proper for him, in the efficient and zealous conduct of the business entrusted to him, to accept deliberately the terms contained in the bill of lading, rather than not effect this object.

The debt for which the contested lien was given was, by the terms of the bill of lading, a debt due either by the shipper or "consignee." The contention of Sir Alfred Cripps, on behalf of the respondent, on this point is that Whinney is both shipper and consignee, and that he owed nothing for back freights, while that of Mr. Bailhache, on behalf of the appellants, is, as I understood it, that, at all events, between the contracting parties, the company, which did owe back freights, is the consignee, and must be so treated. The judgment of Fletcher Moulton L.J. is, apparently, to the effect that the company must, for the purposes of this case, be treated both as shipper and consignee, and that Whinney is only in the position of a general manager of the company appointed by the company itself. This latter point has not, as I gather, been relied upon on behalf of the appellants in argument before your Lordships.

The decision of the question turns upon the construction of the letter of January 13, 1909, since it is admitted that the bill of lading must be read in conjunction with it. In my opinion Sir A. Cripps is right. I think it is obvious the company were not the shippers. The very words "receiver and manager" convey, according to the above-mentioned authority, that Whinney was not an agent of the company, but that he was managing their affairs under the order of the Court, and that all their powers are in abeyance. It would seem to me plain, therefore, that the Ind, Coope & Co. designated as consignee must be the same company as that first mentioned in this letter; that is, the disabled and superseded company whose powers are dormant; so that the letter must be read as if, after the words Ind, Coope & Co., Limited, where the same occur for the second time, the words "over whose business the above-mentioned A. F. Whinney has been appointed receiver and manager by the Court" had been written into it.

Read with that interpolation this letter, in my view, amounts, in effect, to a direction to consign the beer to Whinney, receiver and manager, c/o Turnbull Junior & Somerville, Strada Reale, Malta. And if the same interpolation be made in the bill of lading, as I think it must, then Whinney is himself, under the contract, the consignee, and as he owes nothing for back freights there is no lien.

As regards the second point, the money sued for was paid under protest to obtain the delivery of the goods, and the question must be determined as if this was a proceeding, instituted by the appellants, to enforce this lien. The question for decision then would resolve into this: Would Whinney be estopped in such an action as against the appellants from asserting that he had no power to create the lien, and that it was invalid in law?

It is to be observed that no evidence whatever was given to shew that the appellants refused to ship their goods, or would not have shipped them, except upon the terms of getting this lien. It may well be that the way in which Whinney did this business was the ordinary way in which such business was done by the superseded firm. That, however, in my view, is not enough. He was not the agent of the company, but the officer of the Court. His powers were those of such an officer, not those of the company or of an agent or manager appointed by them, who might possibly be held by implication to have conferred upon him power to conduct the business in the mode, and on the lines, upon which it had been theretofore conducted by them. His position would appear to me, therefore, to resemble somewhat that of the directors of a company, who, as I understand the authorities, are not estopped at law from relying on the fact that a contract which they made or an act which they did was ultra vires and invalid (whether it was an act which could be ratified by the shareholders or not) as against a person who knew, or should be taken to have known, what their powers were, and therefore knew, or should be taken to have known, that the contract or act was ultra vires: see Lindley on Companies, 6th ed., pp. 217, 351, 671. In *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) Lord Bowen, then Bowen L.J., at p. 718 says, "In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?" And Fry L.J. at p. 719 says, "No corporate body can be bound by estoppel to do something beyond their powers." And see

(1) (1887) 18 Q. B. D. 714.

Balfour v. *Ernest* (1); *Kearns* v. *Leaf* (2); *Chapleo* v. *Brunswick Permanent Building Society*. (3) These two cases turned upon the ignorance of the plaintiffs of the defendants' want of authority to accept bills. But for that ignorance it is obvious the plaintiffs must have failed to establish personal liability against the directors.

It is contended on behalf of the appellants that the inability of the receiver to create the lien contended for is merely a matter between him and the debenture-holders; that they may no doubt dispute, before the Court which appointed him, his claim to be reimbursed out of the assets of this company for the sum paid to obtain delivery of the goods, but that with this the appellants have no concern. If that reasoning be sound, the receiver could pledge the goods for a personal debt of his own. I do not think that it is sound. The creation of a lien such as that purported to have been given was not shewn to be incidental to or consequential upon those things which the respondent was authorized to do. It was prima facie ultra vires, as the appellants must be taken to have known. In my opinion, therefore, the lien was invalid, and the respondent is, on this ground as well as on the other, entitled to receive back the money sued for. The appeal should, I think, be dismissed.

Lord Shaw of Dunfermline. My Lords, the opinion which I have formed in this case differs from those just delivered. I have arrived at it with diffidence, and only after repeated consideration. I shall express briefly how the matter strikes me.

The appellants own a line of steamships trading between Liverpool and Malta. For a good many years Messrs. Ind, Coope & Co., brewers, have been in the habit of sending by the appellants' steamers consignments of beer to themselves, care of their agents, Messrs. Turnbull Junior & Somerville. In the course of trade the custom had arisen of shipping upon contracts which provided that the shipowner should have a lien over the consignments for the freight applicable to the cargo and for all freights unpaid. In the present case it is admitted that 171*l*.

(1) (1859) 5 C. B. (N.S.) 601.
(2) (1862) 1 H. & M. 681.
(3) (1881) 6 Q. B. D. 696, 712, 713.

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was due from Ind, Coope & Co. to the appellants in respect of previously unsatisfied freights. A lien was claimed under the terms of the contract accordingly. The lien has been released by payment, subject to the determination of the point whether such a lien was, in the circumstances, enforceable.

There can be no doubt that, under the contract and by the terms of the bill of lading, the payment is due; and no one questions that, had certain events not occurred in the history of Ind, Coope & Co., the lien was good. A few days, however, before this contract was made, a receiver and manager was appointed of the estate of Ind, Coope & Co., at the suit of debenture-holders. The fact that there was such a receiver and manager was brought home to the appellants, because a week after his appointment, namely, on January 13, 1909, the shipping instructions to the appellants were: "Please deliver ale as below, charging to Yours respectfully, Ind, Coope & Co., Limited, by Arthur F. Whinney, Receiver and Manager, C.C.C."

In the instructions the consignees were stated to be "Ind, Coope & Co., Limited, c/o Turnbull Junior & Somerville, Strada Reale, Valetta, Malta," and the bill of lading which followed named the consignees as "Messrs. Ind, Coope & Co., Limited, c/o Messrs. Turnbull Junior & Somerville, or to his or their assigns." The bill of lading, following in this the previous practice of the business, created a lien which covered "any previously unsatisfied freight . . . . due either from shippers or consignees to the shipowner." It is plain, accordingly, to my mind that, if Messrs. Ind, Coope & Co. were either shippers or consignees, the contract which Mr. Whinney made would cover debts due by Ind, Coope & Co., unless either of two things had occurred, namely, (1.) that the entity known as Ind, Coope & Co. had ceased to exist in law, or (2.) that, Ind, Coope & Co. still subsisting in law, a contract entered into at that date, naming them as consignees, was a contract made sub conditione, and the condition was of such a character as to wipe out completely that part of the contract which stipulated for a lien in respect of all previously unsatisfied freights.

With regard to the first point, namely, whether Ind, Coope & Co., as a legal entity, was continued after the appointment of

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a receiver, I respectfully agree with the judgment of Fletcher Moulton L.J.: "It was suggested that Ind, Coope & Co., Limited, after the appointment of the receiver and manager was a different entity from that which it was before that date. To my mind this is a complete fallacy. The company then was and still is a going concern. No steps had been taken to wind it up. The debenture-holders found that it was to their interest to keep the company alive, and, so long as it lives, it is and must be one and the same entity. No one but the limited company of that name can carry on the business of Ind, Coope & Co., Limited, so long as that company exists. The whole beneficial interest in its assets may have passed to the debenture-holders and others, and this may fundamentally change the position of those who seek to enforce legal rights against it, but its identity is unchanged, and, as the consignee under the bill of lading is Ind, Coope & Co., Limited, it is the same consignee to whom the previous consignments were sent, and these unpaid freights come within the lien clause exactly as they would have come if the debenture-holders had not taken steps to enforce their security." I do not desire to put the point in any language of my own, adopting as I do in its entirety this paragraph of the learned Lord Justice's opinion.

The second question is: Was a contract containing a clause so specific and clear, a clause which included within the scope of the lien freights previously unsatisfied by Ind, Coope & Co.—was that clause substantially excised from the contract by reason of the appointment of a receiver? I cannot see my way clear to hold that it was. It may be quite true that the effect of the appointment of a receiver would be to place all creditors for debts of the company outstanding at the date of the appointment in a class separate from those who made advances or rendered service to the company after or during the receivership. But in point of fact what Mr. Whinney did in this contract was himself to make—even although he were considered a different person in law from Ind, Coope & Co.—a shipping contract, one of the terms of which was that the outstanding debts of the appellants should be paid as the agreed upon return for the then present service of conveying certain goods under the bill of lading to Malta. It was free to him to make that bargain; and

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it was free to the appellants, the shipping company, to decline to carry the goods or to stipulate for higher freights or different terms. But in my humble opinion, with the utmost deference to the learned judges who reach a different result, it is not free for him to say that he is not bound by an integral portion of the bargain, or to put forward the plea that he had not read a certain part of the contract which, quoad ultra, he admits must stand. They were satisfied to go on as before, and the contract was thus made in circumstances which I find clearly expressed in the judgment of Hamilton J.: "He" (that is, Mr. Whinney) "instructed the goods to be shipped on the terms that the contract was to contain the usual clause under the bill of lading, so long in use, and he gave instructions for the shipment of the goods in continuation of a course of business, and with no such indication that the terms of that business were to be limited as would lead to the inference that any different contract arose in the case of this shipment from the contract that had arisen in the case of prior shipments."

The question is raised in several of the judgments of the Courts below as to whether the shippers, Ind, Coope & Co., formerly, and Ind, Coope & Co., per Whinney, latterly, were the same shippers. There is much to suggest that substantially they were—the continued entity of Ind, Coope & Co. being as stated. But I do not think it necessary to deal separately with that point; for, in my judgment, it is sufficient to say that by the express terms of the contract Ind, Coope & Co. were the consignees of this cargo—stated as such by name. Although the fact of a receivership had occurred in the history of that concern, that fact did not, as I have observed, disable the receiver from making the contract in these terms, or from shipping goods in accordance with the custom which previously had obtained. I do not find sufficient in this case to entitle me to say that I can upset that contract or import into its conditions something foreign to the previous relations of the parties, or excise from the contract what it itself stipulates, namely, that the lien was to cover past freights due to the appellants by the shippers.

I admit the difficulties of the case; but I tender my respectful assent to the conclusions reached by Hamilton J. and Fletcher

Moulton L.J.—remarking, finally, that I take it to be somewhat serious that the holders of contracts of that kind should find them substantially modified by events which impinge upon and cut down their terms, and leave it thus open to a receiver to make contracts in comprehensive terms, which he had an undoubted power to make, but upon the construction of which it is open to him to maintain that they are less comprehensive in law than they appear to be on the face of the statement, and, therefore, that the carriers must, on the one hand, stand bound by the contract of carriage, but, upon the other, be limited in their rights of lien and recovery under that contract.

LORD MERSEY. My Lords, it is unnecessary to restate the facts of this case. They will be found sufficiently set out in the judgment of Hamilton J., and they are not in dispute. It is important, however, to consider two preliminary matters before turning to examine the terms of the contract out of which the action arises. The first is as to the position and powers of Mr. Whinney as receiver and manager of Ind, Coope & Co., Limited, and the second is as to the nature of the action itself. Mr. Whinney was a receiver and manager appointed by the Court; he was not appointed by the debenture-holders, although, no doubt, he was appointed at their instance; nor was he appointed by the company. He was agent for neither the one nor the other, and, therefore, could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The debenture-holders could certainly not be sued upon it, for they as a body never had power to carry on the business or to contract in relation to it, nor could the company be sued upon it, for they had ceased to be able to make any contracts by an agent or otherwise. Thus no question of ultra vires arises. Mr. Whinney was merely an officer of the Court, directed by the Court, and by the Court alone, to do a certain thing, namely, to carry on the business of Ind, Coope & Co., Limited, in the ordinary way, until such time as the Court might otherwise direct. An obligation was placed on him of making the contracts which might be necessary for so carrying on the business, and annexed to that obligation was a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur. If he were to make contracts not necessary for the carrying on of the business, as, for instance, if he were to buy an excessive quantity of malt or if he were to sell an unduly large quantity of beer, so as to cripple the business, he would be personally liable on the contracts, and when he came to pass his accounts, the Court might refuse him any indemnity out of the assets in respect of the liabilities he had thereby incurred, and might also condemn him in damages for the loss resulting to the business in carrying out the contracts. It would not be for the persons contracting with him to inquire whether the contracts were such as came within the ordinary course of the business. Mr. Whinney, who alone could ascertain whether they were so or not, would have to take the risk of making a mistake in that connection. This was the position of Mr. Whinney with regard to the company of which he was appointed receiver and manager, and with regard to third parties with whom he might contract.

As to the nature of the action brought by him, it is sufficient to say that it was an action brought by him in his personal capacity to recover back money of his own which he had paid to the defendants in order to obtain possession of goods on which the defendants alleged, and he denied, that he had created a lien in their favour. The action was not brought to try the right of the company or of the debenture-holders to the possession of the goods. There was nothing in it in the nature of interpleader, and it raised one simple question, namely, had Mr. Whinney created in the defendants a right to hold the goods as against himself, not as against the company, until the alleged lien was discharged? Such was the position of Mr. Whinney in the litigation, and such was the nature of the action brought by him. I have only referred to these matters because I think some confusion arose during the argument in respect to them. The respondent's counsel did not take a different view of them from mine in the Courts below, nor do I think they intended to put forward a different view before your Lordships' House.

I come, therefore, to the question in the case, namely, did Mr. Whinney create a lien on the goods in respect of the back freights? It is said, in the first place, that he did not, because he could not, inasmuch as the goods were not his. To this contention there are two answers—first, that he was in lawful possession of the goods with power to pass the property in them by virtue of the order of the Court under which he was acting. He could certainly sell them and give a good title to a buyer; he could also, as part of the carrying on of the business, forward them to the Maltese agency and make such contracts as might be necessary or usual in that behalf. And in the next place it appears to me that if by the contract of affreightment he purported to give a lien, it does not lie in his mouth to deny that the goods were his. It is not a case of warranty that he had an authority from some one else to give a lien. In such a case he would only be liable in damages for breach of the warranty. It is a case in which the goods for all relevant purposes were his own and had been shipped as his own.

In the next place, it is said that the words of the contract did not create the lien alleged, and this I conceive to be the real question in the case. Now the terms on which the goods were carried are to be found only in the bill of lading, a document which, in the ordinary course of business, would be filled up by Mr. Whinney or his clerk, and then presented to the steamship owners for signature. The terms were the same as those on which the steamship company had carried goods for Ind, Coope & Co. for many years past. The contract, therefore, was one which it was in the ordinary course of Ind, Coope & Co.'s business to make. These terms gave to the steamship company "a lien and right of sale over the goods shipped in respect of any previously unsatisfied freight, due either from the shippers or consignees to the shipowners." Then, who were the consignees? Now, no business man looking at this bill of lading could have any doubt on that point. The goods are "to be delivered (at Malta) to Ind, Coope & Co., Limited, c/o Messrs. Turnbull Junior & Somerville, or to his or their assigns." The reference to Turnbull Junior & Somerville amounts to no more than a notification of an address at which Ind, Coope & Co. are to be found, and the word "order," which appears in this part of the bill of lading, merely means that the document must be indorsed before the goods can be delivered up in exchange for it. Ind, Coope & Co. were thus the consignees, and Mr. Whinney did, by the very terms of the contract of affreightment, give to the defendant shipowners the lien which they set up. Both Hamilton J. and Buckley L.J. were of opinion that Ind, Coope & Co. were the consignees mentioned in the bill of lading. Hamilton J. says, "Mr. Whinney had this beer forwarded upon the terms that it should be consigned to Ind, Coope & Co., Limited," and Buckley L.J. says, "I agree that the company were in this transaction the consignees." Buckley L.J., however, adds, "but not in the sense in which the defendants seek to affirm that they were such"; and he then goes on to state in what sense the word "consignees" is used in this bill of lading. He says, in effect, that the consignees mentioned in the bill of lading are Ind, Coope & Co., "by Mr. Whinney, as receiver and manager."

Here the learned Lord Justice is doubtless referring to the order for shipment of January 13, 1909, which is an order addressed by Mr. Whinney to the agents of the steamship company, directing them to deliver the ale to Ind, Coope & Co., Limited, Malta. This order is signed "Ind, Coope & Co., Limited, by Arthur F. Whinney, Receiver and Manager." But I am at a loss to understand how the fact that the shipper describes himself in the shipping instructions as a receiver and manager can affect the question as to who are the consignees. Ind, Coope & Co. do not, and, indeed, cannot, exist in two different senses. The company has not been wound up, nor is it even in liquidation. The only change that has happened is that, instead of the business being managed by an official appointed by the board of directors, it is managed by an official appointed by the Court; but the company is still the same company and the business is still the same business. Mr. Whinney started no new business; he merely continued the old one, and Mr. Whinney himself clearly understood this when on January 6 he telegraphed to Turnbull Junior & Somerville, "We continue to do business as heretofore. Receiver, Ind, Coope & Co." It was said during the argument that to let the shipowners have the benefit of the lien would be to make them secured creditors taking priority over the debenture-holders. The answer is that the shipowners are not concerned with the debenture-holders. They made their contract with Mr. Whinney, and it is the money of Mr. Whinney which they are claiming to keep in this action. If Mr. Whinney has provided the money in order to free the goods from a lien, which as against the company he ought not to have created, he will not get the amount allowed in his accounts, and the company will be none the worse. To construe the bill of lading contract as the Court of Appeal has construed it is, in my opinion, to twist it from its plain meaning and to deprive the shipowners of part of the consideration for the carriage of the goods for which they stipulated and which was conceded to them.

Another point was taken by the learned Lord Justice in the course of the argument in the Court of Appeal, namely, that Mr. Whinney could not, without the leave of the Court, bind the debenture-holders by charging the goods with the back freights. It was a point which had not been taken before Hamilton J. I think it sufficient to say of it that the same considerations which dispose of the earlier points dispose of this point also. If this contract was one which came within the meaning of carrying on the ordinary business of the company (as I think it was) Mr. Whinney required no leave; the making of it was authorized and, in fact, enjoined by the order of the Court appointing him, and if it did not, it is he, and not the shipowners, who must bear the consequences.

For these reasons I think this appeal ought to be allowed, and the judgment of Hamilton J. restored.

LORD LOREBURN L.C. My Lords, Lord Ashbourne, who is not able to be present to-day, desires me to say that he concurs in the view taken by the majority of your Lordships.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, June 26, 1911.

Solicitors for appellants: *Rawle, Johnstone, Gregory, Rowcliffe & Rowcliffe, for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondent: *Davidson & Morriss.*

[HOUSE OF LORDS.]

H. L. (I.)
1912
Jan. 16.

GEORGE GODWIN BARNHAM SWIFTE . APPELLANT;

AND

ATTORNEY-GENERAL FOR IRELAND AND GODWIN BUTLER MEADE SWIFTE . } RESPONDENTS.

Conflict of Laws—Statute avoiding any Marriage between a Protestant and Roman Catholic celebrated by Roman Catholic Priest—Extra-territorial Operation—19 *Geo.* 2, *c.* 13 (*Ir.*), *s.* 1.

Sect. 1 of 19 Geo. 2, c. 13 (Ir.), enacting that any future marriage between a Papist and a Protestant or between two Protestants, if celebrated by a Popish priest, should be null and void, was not extra-territorial in its operation and did not, while it was in force, affect a marriage between a domiciled Irish Protestant and a foreign Roman Catholic celebrated by a Roman Catholic priest in a foreign country.

APPEAL from an order of the Court of Appeal in Ireland. (1)

The appellant filed a petition under the Legitimacy Declaration (Ireland) Act, 1868, claiming a declaration that he was a lawful son of Godwin Meade Pratt Swifte and Jane Anne Swifte, his wife. In 1833 G. M. P. Swifte, a domiciled Irish Protestant, went through a ceremony of marriage with Maria Theresa, Baroness de Wetzlar, an Austrian Roman Catholic, at Loitsch Kirchdorf in Austria. The marriage was celebrated by a Roman Catholic priest and according to the rites of the Roman Catholic Church.

In 1845, while the Baroness was still alive, G. M. P. Swifte went through a ceremony of marriage with Jane Anne Hopkins at a Protestant church in Liverpool, and the appellant was the sole surviving child of that union.

Jane Anne Swifte (otherwise Hopkins) died in 1847, and the Baroness died in 1859.

In 1863 G. M. P. Swifte married Jane Clarke, and there was issue of this marriage one son, the intervenient respondent on this appeal.

The appellant claimed that the marriage of his father with the Baroness de Wetzlar was null and void under 19 Geo. 2, c. 13 (Ir.), s. 1.

That section provides as follows:—

"Whereas the laws now in being to prevent Popish Priests from celebrating marriages between Protestant and Protestant or between Protestant and Papist have hitherto been found ineffectual, for remedy whereof be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same, that every marriage that shall be celebrated after the 1st day of May which shall be in the year of our Lord God 1746, between a Papist and any person who hath been or hath professed him or herself to be a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment or sentence of law whatever."

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(1) [1910] 2 I. R. 140.

The same legal issue had been previously raised in an action in the Chancery Division in Ireland in which the appellant was plaintiff and the intervenient respondent was a defendant, and which sought for the administration of the personal estate of G. M. P. Swifte. Porter M.R. dismissed the action both on the ground that the appellant was not legitimate and had no locus standi as plaintiff and on the ground that the action was barred by the Statute of Limitations, and his decision was affirmed by the Court of Appeal in Ireland and the House of Lords upon the second ground, neither tribunal expressing any opinion on the question of legitimacy.

At the hearing of the petition Wright J., following the judgment of Porter M.R., declared that the ceremony of marriage celebrated between the parents of the petitioner (the appellant) was not a lawful marriage and that the petitioner was not the lawful son of G. M. P. Swifte, and his decision was affirmed first by the Divisional Court (Gibson, Kenney, and Dodd JJ.) and afterwards by the Court of Appeal (Sir Samuel Walker L.C., Holmes and Cherry L.JJ.).

A. W. Samuels, K.C. (of the Irish Bar), and *F. H. M. Corbet,* (with them *A. M. Bulloch* (of the Irish Bar)), for the appellant. The question of the validity of the Austrian marriage turns upon the scope and effect of s. 1 of 19 Geo. 2, c. 13 (Ir.). That statute was one of a series of statutes forming a penal code having for its object the removal of Roman Catholic influence by preventing mixed marriages in which a Roman Catholic priest should take part and incidentally by discouraging all marriages between a Protestant and a Roman Catholic. [They referred to 7 Will. 3, c. 4 (Ir.); 2 Anne, c. 3 (Ir.), s. 5; 6 Anne, c. 16 (Ir.), ss. 1, 3; 12 Geo. 1, c. 3 (Ir.); 7 Geo. 2, c. 5 (Ir.); 9 Geo. 2, c. 11 (Ir.), ss. 1, 2, 3.] The prohibition of these marriages was a matter of public policy and extended to all Irish subjects whether within the territorial limits or not. This section was framed in very wide language and rendered absolutely null and void any marriage between a Protestant and a Roman Catholic, if celebrated by a Roman Catholic priest, and its object was to extend the stringency of the previous legislation on the subject.

The Master of the Rolls treated the celebration of the marriage by a Roman Catholic priest as a matter of form merely, but by the common law of both England and Ireland the presence of a priest or clergyman was essential to constitute a valid marriage: *Reg.* v. *Millis* (1); *Beamish* v. *Beamish.* (2) The presence of a priest therefore was of the essence and not of the form, and the question of the validity of this marriage must be determined not by the lex loci but by the lex domicilii: *Brook* v. *Brook* (3), where it was held that the marriage of a man with his deceased wife's sister, both being domiciled British subjects, though valid by the law of Denmark, where the marriage was celebrated, was void under Lord Lyndhurst's Act (5 & 6 Will. 4, c. 54). There was nothing in the language of that Act to make it extra-territorial which is not to be found in this Act.

[EARL OF HALSBURY. In *Macleod* v. *Attorney-General for New South Wales* (4) the question was raised whether a colonial statute by reason of the generality of its language was applicable to all mankind, but it was held that the words must be limited to persons actually within the jurisdiction of the Colony.]

[Counsel also referred to *Reg.* v. *Fanning* (5) and *Steele* v. *Braddell.* (6)]

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(1) (1844) 10 Cl. & F. 534, 655.
(2) (1861) 9 H. L. C. 274, 349.
(3) (1861) 9 H. L. C. 193, 207.
(4) [1891] A. C. 455.
(5) (1866) 17 I. C. L. R. 289.
(6) (1838) Milw. Eccl. Rep. Ir. 1.

Denis S. Henry, K.C., and *E. G. M. Swifte* (both of the Irish Bar), for the respondent G. B. M. Swifte, were not called on.

EARL LOREBURN L.C. My Lords, I can thoroughly understand the anxiety of the learned counsel for the appellant to press this appeal, because what is sought is an affirmation of legitimacy by persons who are in no sense responsible for the conduct of their ancestor; and those who desire to establish a marriage thought to be contracted in England or in Ireland by a lady in good faith are entitled to the sympathy of all just-minded men, because they are not in any way to blame for what has happened. But my Lords, this particular appeal hinges upon the question whether the marriage contracted in 1833 between a domiciled Irishman and a Roman Catholic Austrian lady celebrated by a Roman Catholic priest in Austria was a valid marriage or not.

It is obviously and admittedly a valid marriage unless it is made invalid by the operation of the Act of 19 Geo. 2, c. 13 (Ir.). Now, if that Act was only an intra-territorial Act in its operation, it is clear that the marriage was good. Was it an intra-territorial Act in its operation and no more? It was a statute not only not forbidding marriages between Protestants and Roman Catholics, but recognizing that such marriages might be lawful, in accordance with the law of Ireland. All that it did was to say that they should be invalid if celebrated by a Roman Catholic priest. In other words the Act related not to the capacity of the parties to the marriage contract to enter upon a matrimonial contract, but it related to the form and ceremony, however solemn and important, of its celebration.

Now, my Lords, I cannot suppose that the Irish Parliament intended to prescribe what was to be done or not to be done by an Austrian priest in Austria, or that it intended to affect the rule that a marriage which might be validly made in one country is good when made in compliance with the lex loci of its celebration. The Lord Chancellor of Ireland in his judgment adopts the conclusions of Sir Andrew Porter M.R. "'That while mixed marriages were discouraged by the law and rendered void without any judgment or process, if celebrated after May 1, 1746, by a Popish priest, this does not in terms extend to the case of a marriage abroad; (2.) that mixed marriages are nowhere declared by the law to be contrary to the law of God; (3.) that there is not, and never was, any prohibition of such marriages; or (4.) any personal incapacity to contract them. On the contrary these are, and always have been, good and valid (if unimpeachable upon other grounds unconnected with the mode of celebration), unless celebrated within territorial jurisdiction by a Roman Catholic clergyman.'" I think that is perfectly right, and in my opinion this appeal is really quite a hopeless appeal.

Another point was suggested in the course of the argument, turning upon the power of the Irish Parliament to make an extra-territorial law of this kind. I do not think that point is necessarily raised in any way by the case; it has not been argued or discussed, and I do not wish to say anything further upon it. All I wish to say is that in my opinion this case was rightly decided.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. The learned counsel for the appellant have argued their case with great ingenuity and great force, but really it is unarguable, and I do not desire to give any judgment of my own because in my view the judgments in the Courts in Ireland are quite satisfactory.

LORD ATKINSON. My Lords, I entirely concur. I think the judgment of the late Master of the Rolls, Sir Andrew Porter, is absolutely right, and that the line of reasoning by which he arrived at his decision is entirely conclusive.

VISCOUNT HALDANE. My Lords, I am of the same opinion.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, January 16, 1912.

Solicitors for the appellant: *Arthur H. Dabbs & Son, for A. & L. Goodbody, Dublin.*

Solicitors for the respondent G. B. M. Swifte: *Powell & Burt, for H. T. Dix & Sons, Dublin.*

[HOUSE OF LORDS.]

SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY . . . . APPELLANTS;

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AND

BLENNERHASSETT . . . . RESPONDENT.

Practice—House of Lords—Appeal—Competency—Land Purchase—Distribution of Purchase-money—Order of Land Commission—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 13.

No appeal lies to the House of Lords from an order of the Court of Appeal reviewing a decision of a judicial commissioner with reference to the distribution of the purchase-money on a sale of land under the Irish Land Act, 1903.

APPEAL from an order of the Court of Appeal in Ireland affirming an order made by Ross J. sitting as an additional Judicial Commissioner. (1)

The question on the merits raised by the appeal was whether on the distribution of the purchase-money of an estate sold under the provisions of the Irish Land Act, 1903, a mortgagee on such estate to whom no acknowledgment had been given was entitled to be paid out of such purchase-money any arrears of interest due more than six years prior to the lodgment of the purchase-money in the Bank of Ireland.

Ross J. decided this question in the negative, and his decision was affirmed by the Court of Appeal (Walker L.C., Holmes and Cherry L.JJ.).

1912. Jan. 16, 17. *Ronan, K.C.* (of the Irish and also of the English Bar) (with whom was *R. H. Macrory*, of the Irish Bar), for the respondent, took a preliminary objection to the competency of the appeal. This is an order of the Irish Land Commission and no appeal lies to the House of Lords from an order of the Court of Appeal reviewing such an order. If the order is appealable it must be either under the general provisions as to appeals or under the special provisions of the Irish Land Acts. By the Appellate Jurisdiction Act, 1876, s. 3, sub-s. 3, an appeal is given to the House of Lords from any order or

(1) [1911] 1 I. R. 16.

judgment "of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute," and by s. 12, "Except in so far as may be authorized by orders of the House of Lords an appeal shall not lie to the House of Lords from any Court in . . . . Ireland in any case, which, according to the law or practice hitherto in use, could not have been reviewed by that House, either in error or on appeal." There were then in existence in Ireland the old Court of Chancery, the old Courts of Common Law, and certain statutory Courts, including the Landed Estates Court. By the Supreme Court of Judicature Act (Ireland), 1877, the Courts from which an appeal was given by the Act of 1876 were swept away and the Landed Estates Court was made a branch of the High Court, and thenceforward appeals to the House of Lords were regulated by s. 86 of the Act of 1877. *Reg.* v. *Barton* (1) shews that the intention of the Legislature in s. 86 was that in future there should be no appeal to the House of Lords in cases in which up to that time and under the then practice there had been no appeal. That section gives no appeal to this House from an order of an inferior Court established several years afterwards. *Fullerton* v. *Provincial Bank of Ireland* (2) is not an authority for saying that an appeal lies to this House from an order of the Land Commission; the order in that case was an order of the High Court. Therefore no appeal lies in this case unless it is provided by the Land Law (Ireland) Act, 1881, by which the Land Commission was constituted, or the subsequent Land Acts. By s. 48, sub-s. 2, of the Act of 1881 a limited right of appeal is given to the Appeal Court from the decisions of the Land Commission in certain cases and the decision of the Court of Appeal is made final and conclusive. That removes the possibility of an appeal to the House of Lords by virtue of any order made under s. 12 of the Appellate Jurisdiction Act, 1876. By the Purchase of Land (Ireland) Act, 1885, s. 22, an appeal was given to the Court of Appeal from any decision made on a question of law in proceedings under that Act, but that section gives no

(1) [1902] A. C. 268.

(2) [1903] A. C. 309.

right of appeal to the House of Lords. That section for the first time gave a right of appeal from an order relating to the application of the purchase-money of estates. By the Irish Land Act, 1903, s. 24, sub-s. 6, the distribution of the purchase-money is entrusted to the Land Commission, but by s. 71 the judicial commissioner is empowered to transfer the determination of any question of law from the Land Commission to any Division or judge of the High Court, and any such determination shall be subject to the same right of appeal as a final order of the High Court. That procedure has not been adopted here, and the only other right of appeal is conferred by sub-s. 13 of s. 24, which provides that an appeal shall lie to the Court of Appeal from any decision under that section given by a judicial commissioner, "and the decision of the Court of Appeal on any question other than one of law shall be final." The words "other than one of law" alone cannot be read as giving a right of appeal to the House of Lords, and apart from those words there is no right of appeal except to the Appeal Court. *West Derby Union* v. *Metropolitan Life Assurance Society* (1) shews that a proviso of this sort cannot have any enacting effect.

[He was stopped.]

Jellett, K.C. (with him *Garrett Walker, K.C.*, and *John E. Walsh*) (all of the Irish Bar), for the appellants. Sub-s. 13 of s. 24 of the Act of 1903 impliedly gives a right of appeal to this House upon any question of law relating to the application of purchase-moneys. Sect. 24 is one of a group of three sections headed "Purchase-money of estates." Sect. 25 is mainly formal, and s. 26 affects the Lord Chancellor and not the Land Commission. The result is that s. 24 forms a code of itself with reference to appeals relating to this subject-matter: *In re Talbot Crosbie's Estate.* (2) In that case both Palles C.B. and FitzGibbon L.J. were of opinion that a right of appeal to this House was given by implication by s. 24 upon questions of law arising under that section. It is suggested that the excepting words "other than one of law" are to be explained by s. 71, which provides for the transfer of the determination of any question of law by the judicial commissioner to any

(1) [1897] A. C. 647. (2) [1905] 1 I. R. 570, at pp. 573, 581, 582, 584.

Division or judge of the High Court. But such a transfer can only be made either on the application of one of the parties or by the judicial commissioner on his own motion, in the latter case with the consent of the Lord Chancellor. In the language of FitzGibbon L.J., "A priori, this section seems to render it almost incredible that the discretionary transfer of a question of law by the judicial commissioner, himself a judge of the High Court, to any Division, or to another judge of the same Court, is required to create an appeal to which his own determination of the same question would not be liable; or that his not thinking fit to make the transfer should deprive the applicant of an appeal, and should make his own determination final." Further, s. 71 speaks of "the judicial commissioner" and s. 24, sub-s. 13, of "a judicial commissioner." That difference is made advisedly. "A judicial commissioner" comprises not only the judicial commissioner but any other judge who has the powers of a judicial commissioner. "The judicial commissioner" means the person appointed under s. 41 of the Act of 1881. The position of the judicial commissioner is contrasted with that of the other commissioners in Purchase of Land (Ireland) Act, 1885, s. 17 (since repealed in part), Purchase of Land (Ireland) Act, 1891, s. 28, sub-ss. 1, 4, 5, Land Law (Ireland) Act, 1896, s. 23, sub-s. 1, and the Rules under the Land Purchase Acts, 1910, Order XXII. If the judicial commissioner referred to in s. 71 means one particular officer, he and he alone can exercise the powers given by that section, and therefore those powers could not have been exercised by Ross J., who heard this case, because although a judicial commissioner he is not the judicial commissioner. In fact the powers of the section can only be exercised when the person who hears the case happens to be the judicial commissioner, unless it is to be said that the judicial commissioner can exercise the powers of the section although he did not hear the case. That would lead to an extraordinary result, because in that event he would know nothing about the question of law the determination of which was to be transferred. Assuming that the transfer has been made, such determination is to be subject to the same right of appeal as a final order of the High Court; but some final orders are appealable and others are not.

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All these considerations go to shew that s. 71 was not dealing with appeals to the House at all. Returning to s. 24, sub-s. 13, the decisions of the Court of Appeal excepted from finality are in a different category from those declared to be final, and the only means of giving effect to that difference is to say that as regards the excepted decisions there is a right of appeal to this House. The argument on the other side gives no force whatever to the excepting words. These Irish Land Acts constitute a self-contained code as to appeals from decisions of the Land Commission, and whenever finality is intended that is stated in unmistakable terms: Land Law (Ireland) Act, 1881, s. 48, sub-s. 2; Land Law (Ireland) Act, 1896, s. 40, sub-s. 1 (*e*); Irish Land Act, 1909, s. 62, sub-s. 4. In *Butchart* v. *Butchart* (1) under a very similar exception an appeal to this House was held to be competent. [He also cited *De Vesci* v. *O'Connell* (2) and *Walsh* v. *Pemberton*. (3)]

Garrett Walker, K.C., asked the leave of the House to follow on the same side.

EARL OF HALSBURY intimated that it was not in accordance with the practice of the House to hear more than one counsel on each side upon a preliminary objection. Eventually the House, without expressing any concluded opinion on the point, as a matter of indulgence, allowed counsel to proceed.

Garrett Walker, K.C., then argued to the same effect.

EARL LOREBURN L.C. My Lords, a preliminary question was raised in this appeal as to whether or not in this case there is a right to appeal from the order made to the House of Lords. Now if there be such a right of appeal it must appear somewhere in a statute; and we are referred to s. 24, sub-s. 13, of the Irish Land Act, 1903, as being the source of the statutory right to appeal. The sub-section is very short—the words are these: "An appeal shall lie to the Court of Appeal from any decision under this section given by a judicial commissioner, or to which he is a party, and the decision of the Court of Appeal on any question other than one of law shall be final."

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(1) [1901] A. C. 266.

(2) [1908] A. C. 298.

(3) (1879) 4 App. Cas. 737.

Does that confer a right of appeal to the House of Lords? My Lords, it does not do so in terms—that is quite clear. Does it do so as matter of inference? Now, speaking for myself, I am not prepared to say that you can extract a right of appeal from such words, but I do agree that Parliament evidently thought that there might be some right of appeal to the House of Lords, and intended not to take it away if it existed. Supposing that Parliament was wrong in that supposition, still I do not see that these words in sub-s. 13 would have an enacting effect. But I think that Parliament was correct in its supposition, or at all events was correct in safeguarding the retention of some possible right of appeal on matters of law. It is quite possible that there may be such right of appeal if the House of Lords were to make an order authorizing an appeal under s. 12 of the Appellate Jurisdiction Act of 1876. That contingency had to be guarded against when the Irish Land Act of 1903 was passed; and, if so, this state of things would satisfy the disputed words of sub-s. 13.

It is to my mind not necessary to consider whether or not the 71st section of the Act of 1903 would also satisfy the disputed words in sub-s. 13 of the 24th section. It is enough to say that that sub-section does not of itself create or enact a right of appeal to this House, and that is the only statutory enactment to which reference has been made as being the source of a right of such appeal.

EARL OF HALSBURY. My Lords, I content myself with saying that if there is an appeal it must be shewn. It is a principle of law that you cannot have an appeal unless there is either a pre-existing right of appeal at law or a right of appeal conferred by statute. It is enough for me to say that I am not satisfied that here any appeal has been given.

LORD ATKINSON. My Lords, I concur with the judgment of my noble and learned friend on the woolsack.

VISCOUNT HALDANE. My Lords, it may be that in some other proceedings, analogous to these, but differently framed, the question at issue can be brought before this House; but I am

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satisfied, for the reasons given by my noble and learned friend on the woolsack, that as matters stand the appeal is incompetent so far as we are concerned.

Appeal dismissed as incompetent.

Lords' Journals, January 17, 1912.

Solicitors for respondent: *Witham, Roskell, Munster & Weld, for F. & C. Downing, Dublin.*

Solicitors for appellants: *Freshfields, for Whitney & Moore, Dublin.*

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THE SOCIETY OF THE GOVERNOR AND ASSISTANTS LONDON OF THE NEW PLANTATION IN ULSTER WITHIN THE REALM OF IRELAND (COMMONLY KNOWN AS THE IRISH SOCIETY) AND OTHERS . . } APPELLANTS;

AND

HAROLD AND OTHERS . . . . RESPONDENTS.

Salmon Fishing—Drift Nets—Obstruction to Passage of Fish—Nuisance at Common Law—"Fixed Engines"—Fisheries (Ireland) Acts, 1850 *and* 1863, 13 *&* 14 *Vict. c.* 88, *s.* 1; 26 *&* 27 *Vict. c.* 114, *s.* 4.

In a tidal channel adjoining Lough Foyle drift nets 15 feet deep and 600 yards long are used for the capture of salmon by night. Cork floats are attached to the top of the net and lead weights to the bottom to keep it vertical in the water. The net is gradually paid out from the stern of a boat and, when fully stretched, one end of it is attached by a rope to the boat to prevent the net from being lost, and the other end is left free in the water. The boat is not moored or anchored and the net is not pulled but moves with the tide. The salmon are caught by striking the net and becoming enmeshed in it. The net is left in the water so long as it remains in good fishing form, usually from fifteen minutes to half an hour, and it is then boarded with the fish. Drift nets in Ireland are licensed, and in many districts by-laws regulating their use have been made, under the Fisheries (Ireland) Acts:—

Held, that the drift nets were not fixed engines within the Fisheries

(Ireland) Acts and were not an unlawful obstruction to the free passage of fish at common law.

Wedderburn v. *Duke of Atholl* [1900] A. C. 403, does not apply to Ireland.

APPEAL from an order of the Court of Appeal in Ireland affirming a judgment of the Master of the Rolls.

The appellants, the Society of the Governor and Assistants London of the New Plantation in Ulster within the Realm of Ireland (commonly known as the Irish Society and hereinafter referred to as the society), were the owners of a several fishery in the lough and river Foyle. The other appellants were lessees of the fishery from the society and the Attorney-General for Ireland, suing at the relation of the society and their lessees.

The respondents, other than Harold, were fishermen who exercised their calling by fishing for salmon with drift nets in the sea outside the seaward limit of the society's fishery. The respondent Harold was a fish merchant who supplied the other respondents with boats and nets and purchased the fish caught by them.

The action was brought by the appellants for a declaration that the drift nets used by the respondents were (1.) an unlawful obstruction to the free passage of salmon and a nuisance at common law to the society and their lessees and other subjects of His Majesty; (2.) "fixed engines" within the meaning of the Fisheries (Ireland) Acts and consequently illegal; and for an injunction.

The user of the nets complained of by the appellants was chiefly in two channels known as the North Channel and the South Channel, both immediately outside the seaward limit of the society's fishery, namely, a line drawn from Greencastle to Magilligan Point. These channels were separated by a sandbank known as the Tuns Bank, which at most states of the tide was entirely covered by water. The North Channel was about four miles long from Greencastle to Innishowen Head and of an average width of about three-quarters of a mile. The South Channel was shorter and narrower.

The drift net fishing season continued for two months from the middle of June to the middle of August. The fishing could be carried on at almost all states of the tide, but only during the dark hours of the night.

The method of fishing was as follows. The net, which was from 600 yards to 1000 yards long and 15 feet deep, was constructed of fine twine having a mesh ten inches all round and two and a half inches from knot to knot. A light rope to which cork floats were attached passed along the top of the net and lead weights were fastened to the bottom so that when the net was thrown into the water it assumed a vertical position. The net was fished from a whale boat in which there were four or five men. The boat was rowed across the tideway slanting slightly in the direction in which the tide was running, and the men gradually paid out the net from the stern, starting from as close to the shore as possible. When the net was completely paid out one end of it was attached to the boat by a piece of rope twenty or thirty yards long to prevent the net from being lost in the dark; the other end was left free in the water. The boat was not moored or anchored in any way, but was allowed to drift, and the net was not pulled, but remained in the water floating with the tide. Except for the motion of the tide the net was stationary. The salmon were caught by striking the net and becoming enmeshed in it. The net was allowed to stay in the water so long as it remained in good fishing form; it was then boarded with the fish. The time during which a net would remain in good form was normally from fifteen minutes to half an hour according to the state of the tide, but occasionally the net would remain in position for an hour or even longer. Nets were shot from within 50 to 200 yards of one another. According to the appellants' evidence, there was a marked diminution in the number of fish coming up the river during the drift net fishing season.

This method of fishing had been practised in Ireland since 1870 without objection and the drift nets were licensed in accordance with the provisions of the Fisheries (Ireland) Act, 1848. The Fishery Commissioners and subsequently the Inspectors of Irish Fisheries, who were now succeeded by the Department of Agriculture, were authorized by the Fisheries (Ireland) Acts to make by-laws for the protection of fisheries, subject to confirmation by the Privy Council, and in many parts of the coast by-laws had been made regulating the use of drift nets for the capture of salmon. In January, 1907, the Department of Agriculture proposed a by-law prohibiting the use of drift nets for the capture of salmon within one mile of the seaward limit of the society's fishery, but the proposed by-law was not confirmed by the Privy Council.

The Master of the Rolls dismissed the action and his decision was affirmed by the Court of Appeal (Walker L.C. and Cherry L.J., Holmes L.J. doubting but not dissenting).

1912. Jan. 17, 18, 24. *Sir Robert Finlay, K.C.*, and *Ronan, K.C.* (of the Irish and also of the English Bar) (with them *Denis Henry, K.C.*, and *A. K. Overend* (both of the Irish Bar)), for the appellants. Drift nets as used by the respondents are, first, an obstruction to the free passage of fish and a nuisance at common law, and secondly, "fixed engines" within the meaning of the Irish Fishery Acts. *Wedderburn* v. *Duke of Atholl* (1) applies; it is indistinguishable in its facts from the present case. This House decided in that case that by the law of Scotland drift nets identical with those in use in this case were "fixed engines," and not the less so by reason of their motion with the current, and that the use of drift nets for the capture of salmon was not lawful fishing. That decision did not proceed upon any special language of the Scots statutes (which are referred to in a convenient form in *Earl of Kintore* v. *Forbes* (2)), and it is questionable whether those statutes are to be properly regarded as creating any new law or as enforcing the common law. See *Hay* v. *Lord Provost of Perth* (3) and *Wedderburn* v. *Duke of Atholl.* (4) As regards the user of fixed nets or engines there is no difference between the law of Scotland and the law of Ireland or England. In England the use of drift nets for salmon is unknown. The right of the public by the common law of England is to fish; there is no right to obstruct the passage of fish by an act which is not fishing, and setting up an obstruction of this kind is not a lawful act.

(1) [1900] A. C. 403.
(2) (1826) 4 S. 641.
(3) (1863) 4 Macq. 535, at p. 542.
(4) [1900] A. C. 403, at p. 419.

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Lawful fishing is described by Lord Westbury in *Hay* v. *Lord Provost of Perth* (1) as fishing by a net which is not to be fixed or in any manner settled or made permanent in the river, but is to be used by the hand and kept in motion during the operation of fishing. The appellants' case upon the Irish Fishery Acts, which are collected in Conner's Fisheries (Ireland) Acts, depends upon the construction of the Act of 1842 (5 & 6 Vict. c. 106), ss. 18, 19, 22, 23, 24, 26; the Act of 1848 (11 & 12 Vict. c. 92), ss. 8, 31, and schedule; the Act of 1850 (13 & 14 Vict. c. 88), ss. 1, 19; and the Act of 1863 (26 & 27 Vict. c. 114), ss. 4, 5, 6, 26, 44, 46. The provision immediately applicable to the present case is s. 4 of the Act of 1863, which says that "no fixed net that was not legally erected for catching salmon or trout during the open season of one thousand eight hundred and sixty-two shall be placed or used for catching salmon or trout in any inland or tidal waters" and that "any net placed or used in contravention of this section shall be deemed to be a common nuisance," and the section then provides for the forfeiture of the net, and any salmon taken thereby, and imposes penalties upon the owner of the net. That section is to be read (see s. 44 of the Act of 1863) with the definition clause (s. 1) of the Act of 1850, which says that "the words 'fixed nets' or 'fixed engine' shall extend to and include weirs, stake, bag, stop, and still nets, and all other engines or devices used for the like purposes, of whatsoever construction or materials the same may be, or however known or styled, and whether fixed to the soil or held by the hand, or made stationary in any other way." The general words of that definition are wide enough to include drift nets. The Legislature specifies certain particular modes of obstructing fish, but behind that there is the general intention that the passage of fish shall not be obstructed by any fixed net, no matter how fixed. Neither the Irish nor the Scots Acts in terms prohibit drift nets, but the principle underlying them is that all fixed engines are prohibited: Paterson's Fishery Laws, 2nd ed., pp. 32, 41, 147, 177—179; Longfield's Fishery Laws of Ireland, pp. 15—22; Stewart on the Law of Scotland relating to Rights of Fishing, p. 156. The appellants' case upon the

(1) 4 Macq. 535, at p. 546.

common law turns upon the general provisions of Magna Carta (9 Hen. 3) as to rivers, cc. 16, 23, which have been applied to Ireland with the difference that the Liffey is substituted for the Thames, and upon a series of statutes by which those general provisions have been enforced. [Upon this part of the case they referred to Coke's Institutes, 2nd part, pp. 30, 38; Viner's Abridgement, "Nuisance" E. (3.); 25 Edw. 3, statute 3 (sometimes referred to as statute 4), c. 4; 1 Hen. 4, c. 12; 12 Edw. 4, c. 7; Poynings's Act (10 Hen. 7 (Ir.), c. 22); 10 Car. 1 (Ir.), 3rd sess., c. 14; *McAdam* v. *Halliday* (1); *Duke of Devonshire* v. *Smith* (2); *Frewen* v. *Orr* (3); *Hamilton* v. *Marquis of Donegall* (4); *Warren* v. *Mathews* (5); *Weld* v. *Hornby* (6); *Williams* v. *Wilcox* (7); *Malcomson* v. *O'Dea* (8); *Reg.* v. *Ryan* (9); *Holford* v. *George.* (10)] The effect of these provisions of Magna Carta was not to create new law but to enforce the common law. Accordingly in construing these provisions it has been laid down that channels of public navigable rivers were always highways, and that any interference with them was a nuisance at common law: per Lord Denman C.J., delivering the judgment of the Court (Lord Denman C.J., Patteson, Williams, and Coleridge JJ.) in *Williams* v. *Wilcox.* (11) The right of passage of fish and navigation stand on the same footing. The later provision (c. 23) proceeds on the assumption that weirs were unlawful at common law and impliedly legalizes weirs in existence before a certain date. The fact that the drift nets in this case are licensed does not conclude the question at issue, for the Fisheries (Ireland) Act, 1848, which establishes the licences, expressly provides (s. 31) that they are not to confer any right of fishing or of using any instrument or device for taking fish which the holder of the licence would not have possessed if the Act had not been passed. The Fisheries (Ireland) Act, 1850, also contains a provision (s. 19) that nothing in that Act or the preceding

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(1) (1813) Al. & N. 459, n.
(2) (1833) Al. & N. 442.
(3) (1842) Longf. & T. 601.
(4) (1795) 3 Ridg. P. C. 267.
(5) (1703) 6 Mod. 73.
(6) (1806) 7 East, 195.
(7) (1838) 8 Ad. & E. 314.
(8) (1863) 10 H. L. C. 593, 618.
(9) (1845) 8 I. L. R. 119.
(10) (1868) L. R. 3 Q. B. 639, 650.
(11) 8 Ad. & E. at p. 332.

Fisheries Acts shall lessen or impair the powers of any Court in relation to the removal or abatement of nuisances "occasioned to navigation, fishery, or the passage of fish, by the placing or maintaining or using of weirs, fixed nets, or other contrivances." Therefore in this respect the common law remains in full force, and at common law there is no right on the part of a lower proprietor to keep the river permanently blocked up by any form of fixed nets. His right is to catch as many fish as he can by proper fishing, but he must not otherwise obstruct the passage of fish up the river.

[EARL OF HALSBURY. I am much impressed by the decision of the Privy Council on the question of the proposed by-law.]

The jurisdiction to make by-laws does not empower the Department of Agriculture or the Privy Council to take away the right of a third person who is injured by an act which is unlawful at common law. The refusal to make a by-law forbidding the acts here complained of cannot affect the rights of the appellants. The Privy Council would consider the matter solely in relation to the rights of the public and not in relation to the rights of the private owners. See as to this an unreported decision of Ball L.C. on April 10, 1877, cited in Conner's Fisheries (Ireland) Acts, 2nd ed., p. 85.

John Gordon, K.C., *A. M. Sullivan, K.C.*, and *Gerald Dougherty* (all of the Irish Bar), for the respondents, were not called on.

EARL LOREBURN L.C. My Lords, I think there is no ground at all for this appeal. The method of fishing which has in fact prevailed in Ireland for forty years is arraigned. Until this question arose no one has ever questioned this mode of fishing. By-laws can be made and have been made in the case of other fisheries, apparently, which would regulate the mode of fishing, and if they are disapproved of they can be overruled by the Privy Council. Since no one who appeared before the Privy Council in any of the cases has ever thought of suggesting that this mode of fishing was unlawful, we must scrutinize and see what the grounds are for now alleging that it is so. If there has been excess in a lawful method of fishing, then the Commissioners, now represented by the Department of Agriculture, subject to the control of the Privy Council, have power to check it in the interests of the fishery at large.

Now that being the state of things, some one discovered a Scots case which was decided in this House—the case of *Wedderburn* v. *Duke of Atholl.* (1) We are bound by that decision, and if it is right to apply it in this case we should be bound to apply it. But, my Lords, that decision related to another system of laws, and, with all respect to the learned counsel who argued for the appellants, I think it has nothing at all to do with the question that arises in this case. The question that arises in this case is whether this method of fishing was unlawful according to the laws of Ireland. It is said that it was unlawful by the common law. My Lords, no case has been cited to us which decides that, and I cannot see any ground for suggesting that it is unlawful by the Irish common law. It is said also that it is fatal to the interests of the upper waters proprietors. I have looked at the schedule which contains the amount of fish caught each year for a long time in the upper waters and also the number of boats which were exercising at the same time this particular mode of fishing. I can draw no such conclusion; the Court of Appeal could draw no such conclusion as is advanced on the part of the appellants.

Is it then unlawful by statute? It is said it is so because this is a fixed engine or a fixed net. In my opinion it is not so according to the definition clause in the Act of Parliament which describes a fixed net or fixed engine.

The only ground really for allowing this appeal which could be urged (if it were a valid one) upon the facts is that the catching of fish in the estuary is an obstruction to the upper waters proprietors. No doubt it is, in the sense that every fish that is caught in the lower part of the waters is prevented from getting to the upper waters, but only in that sense. To admit that as a ground would be to destroy the right of fishing in the lower waters altogether.

My Lords, it seems to me the real remedy, if there has been an abuse of a lawful method of fishing, is for proper by-laws to

(1) [1900] A. C. 403.

be brought forward and to be considered by the Department of Agriculture, and then if need be to be considered by the eminent judges who sit in the Privy Council.

EARL OF HALSBURY. My Lords, I am of the same opinion and I feel no necessity to add anything more to what has been said by the Lord Chancellor. The only observation I wish to make is with regard to the decision which has been quoted. What I said there I abide by. The only reason why a different decision arises here is that the law is different in the one case from what it is in the other.

VISCOUNT HALDANE. My Lords, Lough Foyle opens out to the sea by a channel which is divided by a bank called Tuns Bank into what are called the North Channel and the South Channel. The North Channel is the most important for the purposes of this case. In the North Channel it is the custom of certain fishermen to use nets which are of the nature of drift nets—that is to say they are nets on an average some 600 yards long, some of them longer, fastened by weights attached to the bottom, with a light rope at the top, and drifting, being controlled simply by a rope which is attached to a boat for the purpose of enabling them to be hauled in and manipulated. These nets move with the current but otherwise remain, for a considerable time at all events, in a stationary position. They are used during two months of the year, June and July, and for some three hours at night; they cannot be used in daylight because the fish would see the meshes of which they are composed.

The question is whether this is a legal mode of fishing; and it is said to be illegal on two grounds, first that it is a common law obstruction to the navigation and to the passage of fish. As to the question of obstruction to navigation, evidence was not given upon that point and we may pass it by. As to the obstruction to the passage of fish, it is quite obvious that nets used for a very limited period of the year such as I have described, and only for a few hours at night, are not a complete obstruction to the passage of fish. All fishing to some extent obstructs the passage of fish—it is a question of degree.

Viscount Haldane.

My Lords, the second ground upon which it was said that these nets were prohibited was that they were illegal "fixed engines" within the meaning of s. 4 of 26 & 27 Vict. c. 114, being one of the Irish Fishery Acts; and they were said to be "fixed engines" largely because of the decision given by this House in *Wedderburn* v. *Duke of Atholl* (1) in the year 1900. My Lords, I think it probable that if these nets were used in Scotland in that place which was the subject-matter of litigation in the *Duke of Atholl's Case* (1) they would be held to be illegal in accordance with that decision; but why? In Scotland a long series of Scots statutes embodying and explaining the common law has limited in a very close fashion the right to fish for salmon in estuaries; and the result is that there has grown up there a code of common and statute law combined, which has been interpreted by the Courts, which has practically limited the right to fish for salmon at all events in estuaries to something analogous to and nothing beyond the mode of fishing which is generically described as "net and coble fishing."

But, my Lords, that code is a Scots code. It is a very different code from the code which prevails in Ireland, where the statute law and possibly the common law also are different. In Ireland when you look at the law which regulates salmon fishing you find a series of statutes which make it first of all quite clear that drift nets are capable of being licensed and which empower the Commissioners to license the use of these drift nets. Then in the second place you find another set of statutory powers given to Commissioners, now represented by the Department of Agriculture, to make by-laws regulating the fishing; and if you turn to the long list of those by-laws which is conveniently set out in Mr. Conner's book on the Irish Fishery Laws you will find at the end of the book some thirty practical illustrations which shew that by-laws have been made all over Ireland regulating, among other things, the use of drift nets.

Now it is to my mind impossible to say in the face first of all of that licensing provision for drift nets, and secondly of this by-law legislation, that drift net fishing in Ireland is put upon the same footing as drift net fishing is put by the common law of Scotland.

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(1) [1900] A. C. 403.

By the common law of Scotland practically everything is prohibited, under the circumstances we are considering, except fishing with a movable net controlled by the fisherman. It appears to me to be plain that by the course of the Irish legislation what are called "drift nets" as distinguished from "fixed engines" are made lawful under certain conditions, and the power to regulate the use of them is conferred by statute. Under these circumstances it appears to me that the decision in the *Duke of Atholl's Case* (1) was a decision on a totally different code of law and does not govern this case, and as I find that the use of nets like this has continued for long and has been the subject of what appears to me to be statutory recognition, I cannot come to the conclusion that they are "fixed engines" prohibited by the 4th section of the 26th and 27th Victoria, and I am therefore of opinion that the decision of the Court below was right and that the appeal ought to be dismissed.

LORD ATKINSON. My Lords, I concur with my noble and learned friend on the woolsack and I only wish to state that in my opinion the *Duke of Atholl's Case* (1) has no application whatever to this case.

As I understand, what was decided in the *Duke of Atholl's Case* (1) was this and only this, that the only legal mode of fishing in Scotland for the capture of salmon is by "net and coble," and that the fishing which was complained of in that case was not a reasonable exercise of the right to fish by net and coble. But, my Lords, when the case is examined it will be found that it is exclusively based on Scots laws and Scots authorities. There is not I think a single reference, so far as my memory serves me, to any English enactment or to any Irish enactment or to a single case in either of those countries. Therefore I say that case is no authority on the fishing laws of Ireland.

Now the next reason why I think the judgment of the Court below is right is this: I do not think that a drift net which is altogether unattached to the soil and is allowed to drift up and down a river or estuary as the tide may carry it in one direction or the other is a "fixed net" within the definition contained in the 13th and 14th Victoria inasmuch as the words are a net "fixed to the soil," . . . . "or made stationary in any other way." It would appear to me that those words necessarily imply that the net must be made stationary in relation to something, and that something is the soil. It may be erected on the soil as stake nets are; it may be made stationary by being held by a man who is himself walking on the soil and thus be indirectly fixed to the soil; or it may be fixed to the soil indirectly by being held by the hand of a man in a boat which is itself anchored; but it must in all cases be fixed not with reference to the current in which it is carried, but to the soil.

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(1) [1900] A. C. 403.

My Lords, my next reason is that these Irish statutes in several of their sections draw a distinction between "drift nets" and "fixed engines." These different sections have been analysed by Cherry L.J. and I do not think it is necessary to go through them again; they lead one irresistibly to the conclusion that "drift nets" are not prohibited.

The last observation I wish to make is this. On looking through the appendix attached to Mr. Conner's book, I find there is not a single considerable estuary round the coast of Ireland, with the exception I think of this river Foyle, in which by-laws have not been passed from time to time for the last forty years regulating, in the general interests of the fisheries of Ireland, the size, the attachments, the mode of user, and the time of user of these very "drift nets" for the capture of salmon. Those by-laws once passed and approved have as much the force of law as if they were embodied in these statutes. One of the sections of one of these Acts expressly provides that they are legal enactments the moment they are passed. In face of that legislation, those practices, and this recognition of their legality, I think it is impossible to hold that the fishing complained of is an illegal mode of fishing within the meaning of either the Irish common law or statute law.

My Lords, I thoroughly concur with what my noble and learned friend has said, that if there is an abuse of their legal rights by those persons entitled to fish, and if the general interests of the fishery are thereby prejudiced—if the stock of fish is brought so low as practically to lessen seriously the supply of fish—the proper tribunal to deal with that matter is the Privy Council,—first the Commissioners, or the Department of Agriculture now, with an appeal to the Privy Council. It is significant that the very by-law which was proposed to be enacted for this estuary, and which was supported by the present appellants, only proposed that this fishing should be prohibited within one mile seaward of a line from Magilligan Point to Greencastle. I presume every mode of fishing in the lower waters must to some extent prevent the access of fish to the upper waters. The most effectual way of preventing fish getting to the upper waters is to catch them in the lower waters. But when we look at the schedule it is perfectly apparent, that the injury to the fishery of the appellants has been very greatly exaggerated, because in one of the years, when, I think, eighty-three boats were fishing in the lower reaches, they captured as much fish as on many previous occasions. No doubt there must necessarily be obstruction to some degree, but my reason for concurring in the judgment is, as I have already mentioned, that this is not, in my opinion, an illegal mode of fishing, and that there is no evidence before us to shew that it has been carried out in an illegal way.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed.

Lords' Journals, January 24, 1912.

Solicitor for appellants: *Leonard Maton, for B. H. Lane, Dublin.*

Solicitors for respondents: *Charles Russell & Co., for J. E. O'Doherty, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)
1912
Jan. 31.

THE OWNERS OF THE STEAMSHIP HERO . . . . APPELLANTS;

AND

THE COMMISSIONERS FOR EXECUTING THE OFFICE OF THE LORD HIGH ADMIRAL OF THE UNITED KINGDOM, AND THE OFFICERS AND CREW OF H.M.S. BLACKWATER (SUING FOR THEIR LOST EFFECTS) . . . . RESPONDENTS.

Admiralty—Collision—Negligence of both Ships—Negligence contributing to Accident—Sudden Emergency.

In an action of damage by collision brought by the Admiralty and the officers and crew of a torpedo boat destroyer (suing for their lost effects) against the owners of a merchant steamship, who counterclaimed against the officers of the destroyer, the President held that those in charge of the merchant ship were negligent in getting the ship into a wrong position with reference to a flotilla of warships, of which the destroyer formed part, and in wrongly porting her helm; that the commander of the destroyer was negligent in giving contradictory orders consequent on the porting of the helm by the merchant ship; and that the collision could have been avoided by the exercise of ordinary care and skill on the part of the destroyer. He therefore held that the destroyer was alone to blame. The Court of Appeal, reversing the President on a finding of fact, found that the merchant ship, when porting her helm, omitted to sound the appropriate signal required by art. 28 of the Regulations for Preventing Collisions at Sea, and held there was statutory blame on the part of the merchant ship within s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, and consequently that both vessels were to blame:—

Held, on the facts found by the President, that the negligence of the merchant ship mainly contributed to the collision, and that both vessels were in fact at fault.

Decision of the Court of Appeal affirmed on different grounds.

APPEAL and cross-appeal from an order of the Court of Appeal varying a judgment of the President. (1)

The action was brought by the Commissioners for executing the office of Lord High Admiral of the United Kingdom, and the

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(1) [1911] P. 128.

H. L. (E.)
1912

HERO (OWNERS OF S.S.) v. COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM.

officers and crew of H.M.S. *Blackwater* (suing for their lost effects) (the respondents and cross-appellants), against the owners of the steamship *Hero* (the appellants) for damages in respect of a collision between the *Blackwater* and the *Hero*. The defendants counterclaimed against Commander Warren and Gunner Irish, who were respectively the commander and the officer in charge of the *Blackwater* at the time of the collision, in respect of damage sustained by the *Hero*. The collision took place shortly after 11 P.M. on April 6, 1909, in the English Channel a few miles to the eastward of Dungeness.

H.M.S. *Blackwater* was one of a flotilla of torpedo boat destroyers which was proceeding up channel at a speed of about eleven knots in the course of a voyage from Portland to the Firth of Forth. The *Hero* was proceeding down channel on substantially an opposite course at a speed of about ten knots in the course of a voyage from Rotterdam to Bristol. The flotilla, which consisted of twenty-one ships, was proceeding in two columns disposed abeam to starboard, and each column was divided into three sub-divisions. The proper distance between the two columns was four cables, but as the *Hero* was approaching the flotilla the ten ships in the starboard column were somewhat out of position; the leading sub-division being to starboard of their position, the second sub-division being in position, and the third sub-division to port of their position. In these circumstances the *Hero* passed the three vessels of the leading sub-division port to port (thus getting between the lines of the flotilla), and she passed the four vessels of the second sub-division starboard to starboard. When passing the second sub-division in this manner the *Hero* suddenly ported her helm, apparently with the intention of passing the third sub-division, of which the *Blackwater* was the leading vessel, port to port.

According to the evidence from the *Hero*, which was accepted by the learned President, a short blast was sounded on the *Hero*'s whistle when she ported. Thereupon Gunner Irish, the navigating officer of the *Blackwater*, ported her helm in order to pass the *Hero* port to port. The destroyers *Arun* and *Moy*, which were following the *Blackwater* in this sub-division, in their turn ported and in fact passed the *Hero* port to port. The *Blackwater* was kept on her port helm until Commander Warren, who was summoned from the chart room, where he was lying down, reached the bridge. The *Hero* was then distant from the *Blackwater* about two cables. Without asking for or receiving information as to what helm the *Blackwater* was under, Commander Warren ordered the helm hard-a-starboard and both engines full speed ahead. These orders were carried out, as was a subsequent order given by Commander Warren to hard-a-port, and he at the same time, intending to reverse the starboard engine to assist the port helm, reversed both engines full speed. The only whistle signal sounded by the *Blackwater* was three short blasts, but immediately afterwards the engines of the *Blackwater* were again ordered full speed ahead. When the *Blackwater* was seen by the officer in charge of the *Hero* to be starboarding after having apparently ported, the engines of the *Hero* were reversed full speed astern and her whistle was sounded three short blasts. But the vessels came into collision, the stem of the *Hero* striking the starboard side of the *Blackwater* between amidships and the stern. The *Hero* was damaged and the *Blackwater* sank.

The learned President (assisted by nautical assessors) held that those responsible for the navigation of the *Hero* were negligent in getting the vessel into a wrong position with reference to the flotilla and in wrongly porting her helm; and that the officers in charge of the *Blackwater* were also negligent, Gunner Irish in not informing Commander Warren under what helm the *Blackwater* was, and Commander Warren in giving contradictory orders; but he came to the conclusion on the evidence that the *Blackwater* could by the exercise of ordinary skill and care by her officers have avoided the collision by keeping on the port helm, and ordered that judgment should be entered for the defendants on the claim and counter-claim.

The Court of Appeal (assisted by nautical assessors), differing from the President upon a finding of fact, found that those in charge of the *Hero*, when porting the helm, did not sound the appropriate signal required by art. 28 of the Regulations for Preventing Collisions at Sea, 1897, and held there was statutory blame on the part of those in charge of the *Hero* within s. 419,

H. L. (E.)
1912

HERO (OWNERS OF S.S.) *v.* COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM.

sub-s. 4, of the Merchant Shipping Act, 1894. Accordingly they held that both vessels were to blame.

The appeal to this House was heard with the assistance of nautical assessors.

1912. Jan. 30, 31. *Laing, K.C.*, and *Adair Roche*, for the appellants. The President found all the facts in favour of the appellants and the Court of Appeal did also, except the fact as to the blowing of the whistle. The finding of the President upon this point, which depended upon the credibility of the witnesses, ought not to be disturbed. There is no evidence in support of the view taken by the Court of Appeal. The collision was caused by the series of contradictory orders given by Commander Warren.

Sir Rufus Isaacs, A.-G., and *Butler Aspinall, K.C.* (*A. D. Bateson, K.C.*, with them), for the respondents and cross-appellants. The sudden porting of the helm of the *Hero* caused such an emergency that Commander Warren ought to be excused for not taking a seamanlike course, and upon that view the *Hero* is alone to blame: *The Bywell Castle.* (1) Even if the respondents fail to make out a case of sudden emergency, still the negligence of the *Hero* caused the negligence of the *Blackwater*, and the burden lies on the *Hero* of establishing that her negligence did not contribute to the collision. That burden has not been discharged, and, applying the law as laid down by the President, both vessels are to blame.

Laing, K.C., in reply. *McIntyre Brothers* v. *McGavin* (2) shews the reluctance of the House to reverse the conclusions of the Courts below on questions of fact.

[The question of the effect of the Regulations for Preventing Collisions at Sea, 1897, and s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, was also argued, but, in the view of the facts taken by the House, no question of statutory blame arose, and it is therefore unnecessary to report the arguments on this point.]

EARL LOREBURN L.C. My Lords, I do not think there is any necessity to enter upon the history of what took place in this case, all of which has been most admirably presented in the arguments of the counsel both for the appellants and for the respondents.

(1) (1879) 4 P. D. 219.

(2) [1893] A. C. 268, 275.

Earl Loreburn L.C.

The Court of Appeal found that there was statutory blame, and therefore both were in fault. In my opinion, and I think the opinion is shared by your Lordships, I arrive at the same conclusion upon the ground that both these vessels were in fact in fault. The *Hero* ported at a time and in circumstances which have not been explained, and which to my mind as presented are quite unintelligible, running across the bows of three torpedo destroyers which were coming up in an opposite direction. That, in the ordinary plain common sense of this business, not only contributed but mainly contributed to this accident. On the other hand the *Blackwater* I think also was not free from fault because, after she had ported, her commander came on the bridge and gave orders which contributed to the accident.

My Lords, I am quite aware of the disinclination, (I will not enter upon it further), which has been expressed in this House, to differ in matters of fact from both tribunals below. In this instance they have not agreed altogether upon their view of the facts; and besides, I do not think that we are differing upon any particular fact which has been found by the learned President, but are differing upon the conclusion from the facts and upon the aspect which they ought to bear when all are ascertained.

I accordingly move your Lordships that this appeal be dismissed, coming as I do, not upon the same ground but upon a different ground, to the identical conclusion which was arrived at by the Court of Appeal.

EARL OF HALSBURY. My Lords, I am of the same opinion and for the same reasons.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I think, for the reasons given by the Lord Chancellor, that both these vessels were to blame.

Appeal and cross-appeal dismissed with costs.

Lords' Journals, January 31, 1912.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitor for respondents: *Treasury Solicitor.*

[HOUSE OF LORDS.]

LEACH . . . . APPELLANT;

AND

REX . . . . RESPONDENT.

H. L. (E.)
1912
Feb. 26.

Criminal Law—Evidence—Incest—Wife of Person charged—Competent or Compellable Witness—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 4.

Under s. 4 of the Criminal Evidence Act, 1898, the wife of a person charged with an offence to which the section applies is not compellable to give evidence against her husband.

APPEAL from an order of the Court of Criminal Appeal.

The appellant was tried for an offence under the Punishment of Incest Act, 1908, at the Stafford Assizes before Pickford J. and a jury and was convicted. At the trial the wife of the appellant was called by the prosecution, but she raised the objection that under s. 4 of the Criminal Evidence Act, 1898 (1), she could not be compelled to give evidence against her husband. Pickford J. ruled that the wife was a compellable witness, and directed her to give evidence, which she did, and this ruling was affirmed by the Court of Criminal Appeal (Lord Alverstone C.J., Hamilton and Bankes JJ.) and the conviction upheld.

Milward, for the appellant. The question is whether under s. 4 of the Criminal Evidence Act, 1898, the wife of the accused is merely competent or is also compellable to give evidence against her husband. To determine the construction of that section it is necessary to see what is the common law on the subject and whether it is still in existence. Now it is a fundamental principle of the common law that husband and wife are one person in law: Lush's Law of Husband and Wife, 3rd ed., p. 3; *Firebrass* v. *Pennant.* (1) It follows from that that at common law neither can testify for or against the other, or take civil or criminal proceedings against the other: *Rex* v. *Inhabitants of Cliviger* (2); *O'Connor* v. *Marjoribanks* (3); *Phillips* v. *Barnet* (4); *Reg.* v. *Lord Mayor of London.* (5) To this rule there are certain recognized exceptions, namely, in the case of (1.) high treason, (2.) personal injuries inflicted by husband or wife on the other, and (3.) forcible abduction followed by marriage. But except in those specified cases it is impossible at common law for a wife to testify against her husband, and that rule is founded on the unity of the husband and wife. That unity may be partially broken by statute by making either husband or wife a competent witness, or it may be absolutely broken by making either a compellable witness; but with that exception the common law still holds good, and in the absence of clear statutory authority the wife cannot be compelled to appear against her husband. The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2, makes parties admissible witnesses, but s. 3 recognizes the existing common law and provides that nothing in that Act "shall in any criminal proceeding render . . . . any wife competent or compellable to give evidence for or against her husband." That section still remains unrepealed. By the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), husbands and wives of parties are made admissible witnesses, but s. 2 again expressly reserves the common law in criminal cases. At common law the wife is neither a competent nor a compellable witness against her husband. By the law of England no prisoner is a compellable witness, and if the husband is not compellable because he is a prisoner, then, in the absence of express

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(1) Criminal Evidence Act, 1898, s. 4: "The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged."

The enactments referred to in the schedule are:—(1.) The Vagrancy Act, 1824, the enactment punishing a man for neglecting to maintain or deserting his wife or any of his family; (2.) the Poor Law (Scotland) Act, 1845, s. 80; (3.) the Offences against the Person Act, 1861, ss. 48 to 55; (4.) the Married Women's Property Act, 1882, ss. 12 and 16; (5.) the Criminal Law Amendment Act, 1885—the whole Act; (6.) the Prevention of Cruelty to Children Act, 1894—the whole Act.

Punishment of Incest Act, 1908, s. 4, sub-s. 4: "Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act."

(1) (1764) 2 Wils. 254.

(2) (1788) 2 T. R. 263, 268.

(3) (1842) 4 Man. & G. 435, 443.

(4) (1876) 1 Q. B. D. 436.

(5) (1886) 16 Q. B. D. 772, 775.

enactment to the contrary, the wife may seek the same protection as her husband and is not compellable because of the unity of husband and wife. The statutes dealing with this subject are set out in Russell on Crimes, 7th ed., vol. ii., p. 2272, and the effect of the legislation is that in practically every instance the wife is spoken of as "competent" or "competent but not compellable." The only exception is in the Married Women's Property Act, 1884. That is the only Act which completely breaks the unity. The Married Women's Property Act, 1882, ss. 12, 16, provides redress by way of criminal proceedings to the husband or wife in respect of offences against the property of the other, and either was made a competent witness against the other. Then by the Act of 1884 either, except when defendant, is made compellable to give evidence. But although ss. 12 and 16 of the Married Women's Property Act, 1882, are included in the schedule to the Criminal Evidence Act, 1898, the Act of 1884 is not so included.

Sect. 1 of the Criminal Evidence Act, 1898, makes the wife a competent witness for the defence, but clause (*c*) recognizes that there is so much unity remaining that she cannot be called except upon the prisoner's application, and clause (*b*) recognizes that the wife is not an ordinary witness because it provides that the prosecution can no more comment on her absence than they could on the prisoner's absence. Reading the words of s. 4 "may be called as a witness" in sequence with the common law and the statutes already passed they must be construed as meaning competent merely and not competent and compellable. That section deals only with the husband's consent; it does not deal with the consent of the witness. Treating those words as meaning competent and nothing more, each of the scheduled enactments would have something added to it because the words "without the consent of the party charged" are new. The distinction between competent and compellable began as early as the Evidence Act, 1851, but it appears in the most recent Acts, 58 & 59 Vict. c. 24, s. 5; 58 & 59 Vict. c. 28, s. 2; 60 & 61 Vict. c. 60, s. 5, thus shewing the same line of thought throughout.

The true construction of s. 4 is that it is a re-enactment of the interpretation of the earlier statutes with the addition that the witness may give evidence against the prisoner's will. The protection accorded to the wife by the common law in a matter of such vital importance ought not to be taken away except by the clearest language.

Sir J. Simon, *S.-G.*, and *Rowlatt* (with them *Mordaunt Snagge*), for the respondent. Three questions arise with regard to the wife's testimony. The first is, Is her testimony admissible at all? That is expressed by saying, Is she competent? The second is, Is she a person who may refuse to give evidence although an admissible witness? If she is, that is expressed by saying she is competent but not compellable. The third is, Assuming that the wife's evidence is admissible and the wife is not unwilling to give evidence, can she give evidence against the will of her husband? There is no word to express that. That is the question which is dealt with by s. 4 of the Criminal Evidence Act, 1898. Before that Act there were twenty-six statutes in which the wife was made a competent witness. Out of those Acts the Act of 1898 has selected four and has added two others. The Act has picked out certain offences which are catalogued by reference to the enactments creating them. Those offences are selected by way of contrast to the other cases in which the wife has been made a competent but not compellable witness because it was desired by reason of the nature of the scheduled offences that the wife should be compellable. But upon the appellant's construction, although the Legislature selected some out of the many statutes and left the rest, they are all to stand on the same footing as before. It is said that the Married Women's Property Act, 1884, was not included in the schedule, but the reason for that is that s. 4 of the Act of 1898 was dealing with offences, and the offences to which the Act of 1884 relates are contained in ss. 12 and 16 of the Married Women's Property Act, 1882, which are included. It may be that the Act of 1898 adds nothing to the Act of 1884, but the one case in which the wife was already a compellable witness was included because, although it was not necessary, it was thought convenient that all the cases in which the wife was made compellable should be collected in one place. Saying that a witness "may be called" does not imply that the witness may refuse to give evidence. Those words relate to the power of the person calling the witness. If a person may be called the legal consequence is that he must submit to examination. There is no standing rule that a wife if competent is not compellable to give evidence. The Act of 1898 eschews the use of the word "compellable" and that controversy. The words of the earlier statutes are "competent but not compellable," not "competent and compellable," and where the word "competent" is used without more the inference is that the witness is compellable. Among the Acts comprised in the schedule to the Act of 1898 is the Prevention of Cruelty to Children Act, 1894. That Act was repealed by the Prevention of Cruelty to Children Act, 1904, and s. 12 of the latter Act provides that the wife of a person charged with any offence under that Act shall be competent but not compellable to give evidence. That provision was unnecessary except on the assumption that the Act of 1898 rendered the wife compellable. That again is altered by the Children Act, 1908, which makes the Criminal Evidence Act, 1898, applicable to Part II. of the Act (which deals with cruelty to children) as if it were substituted for the reference to the Prevention of Cruelty to Children Act, 1894.

Milward replied.

EARL LOREBURN L.C. My Lords, I do not pretend to conjecture whether the decision which your Lordships, I think, will arrive at, is pro bono publico or not. It is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind. It is not our duty to-day to consider consequences at all. What we have to consider is the meaning of the law that has been laid down in the Act of 1898.

My Lords, this appellant was indicted and was convicted for an offence under the Incest Act. In the course of that trial his wife was called and asked to give evidence; she objected to give evidence for the prosecution, but was directed to do so and compelled to do so. The question is whether this was lawful or not. It is clear that this question must be governed by the 4th section of the Criminal Evidence Act, 1898, which runs as follows: "The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged."

Now, my Lords, if it had not been for that 4th section the wife could not have been allowed to give evidence, and the result of that was that the wife could not have been compelled to do so and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognized in a series of Acts of Parliament. Does then the 4th section, which I have read, deprive the wife of this protection? It is capable of being construed in different ways, and it may hereafter lead, for all I know, to various other difficulties, but the present question is, does it deprive this woman of this protection? My Lords, it says in effect that the wife can be allowed to give evidence, even if her husband objects. It does not say she must give evidence against her own will. It seems to me that we must have a definite change of the law in this respect, definitely stated in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed, with what consequences, or how that may be conformable to what is in the true interests of society or the public in this particular case, we are not concerned and are not at liberty to inquire.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. I confess I do not think the matter is one upon which I should myself have entertained very much doubt in the first instance. You must consider, when you are dealing with Acts of Parliament, and examining what the effect of your proposed construction is, whether or not you are dealing with something that it is possible the Legislature might either have passed by definite and specific enactment or have allowed to pass by some ambiguous inference.

Now, dealing with that question, I should have thought that it

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would occur not only to a lawyer, but to almost every Englishman, that a wife ought not to be allowed to be called against her husband, and that those who are under the responsibility of passing Acts of Parliament would recognize a matter of that supreme importance as one to be dealt with specifically and definitely and not to be left to inference.

I think that observation is true also for this reason: that when you are dealing with a question of this kind you cannot leave out of sight the different enactments that have been passed upon this subject with a sort of nomenclature of their own; and speaking for myself, as an ordinary person, I should have asked, when it was proposed to call the wife against the husband, "Will you shew me an Act of Parliament that definitely says you may compel her to give evidence? because since the foundations of the common law it has been recognized that that is contrary to the course of the law." If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say, "To call a wife against her husband is a thing that cannot be heard of,"—to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.

The result is that I entirely concur with the judgment of the Lord Chancellor, and particularly with that part of it in which he said that such an alteration of the law as this ought to be by definite and certain language.

LORD MACNAGHTEN. My Lords, I entirely agree with the views which have been expressed by my noble and learned friends.

LORD ATKINSON. My Lords, I concur. The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

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LORD ROBSON. My Lords, I agree, for the reasons which I think have been sufficiently stated by your Lordships.

Order of the Court of Criminal Appeal reversed and cause remitted to that Court accordingly.

Lords' Journals, February 26, 1912.

Solicitors for appellant: *Mills, Curry & Gaskell, for Johnson & Son, Newcastle-under-Lyme.*

Solicitor for respondent: *Director of Public Prosecutions.*

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1912
Jan. 29.

[HOUSE OF LORDS.]

OWNERS OF KETCH FRANCES . . . . APPELLANTS;

AND

OWNERS OF STEAMSHIP HIGHLAND LOCH RESPONDENTS.

THE HIGHLAND LOCH.

Admiralty—Ship—Collision—Launch—Negligence.

The defendants, being about to launch a steamship which they had built in their shipbuilding yard on the Mersey, arranged with the owners of a buoy which was thought to be in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. The plaintiffs' ketch, which was sailing up the river on the flood tide on the morning of the intended launch, finding the wind falling light, let go her starboard anchor and drifted up the river dragging her anchor, which fouled the mooring chains. The master being unable to free the anchor, the defendants sent messages to him warning him that his ketch was in a dangerous position and advising him to slip his anchor and clear away, but the master refused to slip unless the defendants would make themselves answerable for the anchor. The defendants, deeming it dangerous to life and property to postpone the launch and believing the risk of a collision with the ketch to be slight, launched the steamship, and a collision occurred. In an action of damage by collision brought by the owners of the ketch:—

Held, that the ketch acted unreasonably in refusing to slip her anchor and was alone to blame, inasmuch as the defendants, in the dilemma in which they were placed by the action of the ketch, rightly chose the lesser of two risks.

Decision of the Court of Appeal affirmed.

H. L. (E.)
1912

KETCH FRANCES (OWNERS) v. STEAMSHIP HIGHLAND LOCH (OWNERS).

APPEAL from an order of the Court of Appeal reversing a judgment of the President. (1)

The action was brought by the appellants for damage sustained by their ketch *Frances* by reason of a collision between that vessel and the respondents' steamship *Highland Loch*, and there was a counter-claim by the respondents.

The respondents were Cammell, Laird & Co., shipbuilders and owners of a shipbuilding yard known as Tranmere Yard in the river Mersey. The *Highland Loch*, a vessel of 4729 tons net register, was built by the respondents in this yard, and her launching was fixed to take place at 12.30 P.M. on January 17, 1911. All usual and proper notices had been given previously to the date of the impending launch and all usual precautions were taken on the day of the launch to prevent danger to vessels in the river. A buoy belonging to the Cunard Steamship Company which it was thought might be in the way of the launch was, upon the suggestion of the respondents, removed by the Cunard Company, the respondents undertaking to pay half the cost of removal; but when the buoy was removed the mooring chains of the buoy were left at the bottom of the river without any mark to indicate their position. On the morning of the 17th the final preparations for launching the *Highland Loch* were made by removing the shores and keel blocks from under her so as to let the vessel rest on the sliding ways. The work of removal was begun at 6 A.M. and was not completed till 12.20 P.M.

About 10 A.M. on January 17 the *Frances*, a ketch of 70 tons register carrying a crew of four hands, arrived in the Mersey in the course of a voyage from Pentewan in Cornwall to Runcorn and sailed up the river on the flood tide. When the *Frances* was off Prince's Dock the wind dropped to a calm, and thereupon she let go her starboard anchor and drifted up the river with the tide, dragging her anchor. When she had reached a point a little below the shipbuilding yard her anchor caught in the moorings of the Cunard Company's buoy. The master did not then know what the obstruction was, nor did he know that a launch was impending. About 10.30, while the master was endeavouring to clear the anchor, a boatman was sent to him from the yard with a message informing him that there was going to be a launch and warning him to move away. The master replied that his anchor was foul of some moorings (which the boatman told him were the Cunard Company's moorings) and he refused to slip his anchor. About 11.30 the steam tug *East Cock*, which was one of two tugs in attendance on the *Highland Loch*, was sent out to the *Frances* and the master was warned that his ketch was in a dangerous position. The master replied that he could not help it because his anchor was foul and he could not get it. On receiving the master's reply Mr. Boyd, the manager of the respondents' shipbuilding department, wrote the following letter to the master.

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(1) [1911] P. 261.

"The Captain "Jan. 17, 1911.
"Schooner *Frances*.

"Dear Sir,

"We observe that you are in line of the launch of our s.s. *Highland Loch* and as all preparations are made we must launch the ship at 12.30 to-day. We cannot be responsible for any damage done thereby to your ship and would advise you to slip your anchor and clear away at once.

"Yours truly
"Cammell Laird & Co. Ld.
"W. Boyd
"Manager.

"P.S.—We also cannot be responsible for any accident to any person on board your ship.—C. L. & Co. W. B."

This letter was read to Mr. Lang, the respondents' assistant yard manager, and handed to him with instructions to tell the master of the *Frances* to slip his anchor and allow the *East Cock* to tow him out of the way of the launch. Lang went out in the *East Cock* to the *Frances* and handed the letter to the master, who declined to read it. Lang then advised him to slip his anchor, but the master refused to slip unless Lang would be answerable for the anchor and would tow the *Frances* to a place of safety. Lang replied that he had no authority to undertake responsibility for the anchor. The master then asked Lang to allow the tug to give him a tow to help him to try to heave up the anchor, and Lang consented. Thereupon a rope was passed to the tug which towed the *Frances* down the river and pulled her over her anchor, but this attempt to get up the anchor was not successful. In the meantime Lang had sent a boatman back to the yard with a message that the master would not slip, but that the tug would give the *Frances* a pull down river to the north. This message was received by Boyd at 12.40. Boyd decided to launch the *Highland Loch* immediately, and the first gun was fired as a warning that the launch would take place about five minutes later. As soon as the warning gun was fired the tug cast off the tow rope, took Lang on board, and steamed away in order to assist the *Highland Loch* when she took the water. The *Frances* then drifted back with the tide into her original position. Contrary to expectation, the *Highland Loch* turned down the river, owing to an ebb tide near the shore, and with her stern and propeller struck the *Frances* on the port side, causing her considerable damage. The *Highland Loch* was also damaged.

The evidence on behalf of the respondents on the question of postponing the launch was to the effect that there was always a danger in allowing a launch to be delayed after the shores and keel blocks were removed, because the vessel, being held back solely by a hydraulic stopway, might at any moment take charge and go off on her own account with risk to both life and property in the yard; and that replacing the keel blocks was also attended with danger to the workmen engaged in the operation; and, further, that the risk of a collision with the ketch was a slight one, as the steamship was expected to turn up the river. It also appeared that the master when he refused to slip his anchor did not believe that he was in any danger.

The learned President, assisted by nautical assessors, was of opinion that the master of the ketch was at fault in not slipping and buoying his anchor, but that the defendants were also at fault in ordering the launch without regard to the danger to the ketch, and that in the circumstances the plaintiffs' negligence did not excuse the negligence of the defendants. He therefore pronounced the defendants solely to blame.

The Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.), assisted by nautical assessors, reversed this decision and held the ketch solely to blame.

The appeal to this House was heard with the assistance of nautical assessors.

Bailhache, K.C., and *Robertson Dunlop*, for the appellants. It is the duty of a shipbuilder about to launch a vessel to take every possible precaution to keep the river clear and to give proper warning to approaching vessels. The ketch was rightly where she was and was caught in a trap for which to some extent the launch owners were responsible; at any rate she was there without any fault of her own. They ought to have warned her against the trap. It was not reasonable to ask the ketch to slip her anchor and drift, having only one anchor. The reasonable course was to offer a tug to move the ketch and keep her in a place of safety. The ketch was not unreasonable in refusing to slip her anchor, but, even if she was, there was no unavoidable necessity such as would justify the launch running down the ketch. There may have been a business risk which might be run, but in that case the launch owners ought to pay the damage. [They referred to *The Cachapool.* (1)]

Laing, K.C., and *G. D. Keogh*, for the respondents, were not called upon.

Earl Loreburn L.C. My Lords, I think there are no nice questions of law in this case, nor indeed any question of law at all. It is purely a question of fact.

It is very clear to me that the ketch was to blame and acted unreasonably. It is unnecessary to dwell upon that, because all the learned judges in the Courts below are agreed upon the subject; and I should say that a vessel, if she could get out of the way fairly, finding herself in this position and acting as this ketch did, offered a typical illustration of unreasonableness.

Then we have got to see whether the defendants were negligent; and I can myself perceive where the negligence or breach of

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(1) (1881) 7 P. D. 217.

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duty arose in the circumstances. There is an exceptional state of things of course, when a launch is to take place, because a temporary and exclusive use of the water is required for a short time by those who launch the vessel. Others must do what is reasonable to facilitate that lawful and exceptional use of the water, and the owners of the ship that is about to be launched must of course do the same.

Now I have been watching to see what grounds were alleged of neglect of duty on the part of the owners of the launch, and so far as I can see, these are the things suggested. First, it is said that they ought to have taken precautions so that the mooring chains should not be a source of obstruction at the bottom of the river. That was a suggestion made by the junior counsel for the appellants, but I find it nowhere suggested in any other part of the case. I really think that is so remote that we need not trouble ourselves about it. The defendants were not the owners of the buoy.

The second thing suggested was not warning the ketch beforehand against the trap that was lying ready for her at the bottom of the river. I think that must also be regarded as a great deal too remote. One could not anticipate that the vessel would be dragging her anchor,—"navigating," if you please, "by her anchor,"—and that she would come foul of these mooring chains.

The third thing suggested was not having a ship below the yard to warn coming vessels. This ketch was warned (after she had got into difficulty, it is true) two hours before the launch took place.

The fourth thing suggested was continuing the removal of the keel blocks and shores after the owners of the launch knew that the ketch would be there, and would not, or could not, clear out. I do not know why the owners of the launch should assume that the ketch would act in the thoroughly unreasonable manner in which I think she did act.

The next suggestion was that the owners of the launch ought to have promised to pay the value of the anchor. That seems to me a most unreasonable condition. I cannot see that there is anything at all in that, nor in the complaint that there ought to have been an offer of a tug to move the ketch and keep her out of danger until she could be brought back to her anchor. If the master of the ketch thought that was desirable, he might have asked for it and perhaps it might have been granted. It never occurred to him; and it seems to me to be a suggestion that has only arisen in the course of the litigation.

In regard to the last point that was suggested, namely, that the launch ought not to have taken place and that, it having taken place, the collision was caused without any unavoidable necessity, I have only to say this: the owners of the launch were placed in an extremely difficult position. I am quite satisfied upon the evidence (and of course I can only act upon the evidence) that it would have been a dangerous thing to the men in the yard, and also to those craft that might be in the river, if this launch had been postponed. The master of the ketch was thoroughly unreasonable in refusing to move her as he might have done by slipping his anchor. The owners of the launch were placed in a position in which they had to take one of two risks. It seems to me that they took the lesser risk and wisely took the lesser risk; and that under those circumstances they did nothing to which the law can attach any blame or affix any penalty in the way of damages.

My Lords, I shall say no more upon this case because I am entirely satisfied with the judgment of the Court of Appeal.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. This is entirely a question of fact, and I am quite satisfied that the judgment which the Lord Chancellor has given disposes of all the facts that it is necessary to dispose of in order to arrive at the same conclusion as that which has been arrived at by the Court of Appeal.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 29, 1912.

Solicitors for appellants: *Holman, Birdwood & Co.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Laces & Co., Liverpool.*

[HOUSE OF LORDS.]

HARGREAVE . . . . APPELLANT;

AND

HAUGHHEAD COAL COMPANY, LIMITED RESPONDENTS.

H. L. (Sc.)
1912
March 12.

Employer and Workman—Compensation—Review—Termination—Incapacity resulting from Accident—Concurrent Causes—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I., pars.* 1 (*b*), 16.

Upon an application by employers for the termination of a weekly payment made by them on the footing of total incapacity to a workman who had lost an eye by accident arising out of and in the course of his employment, the arbiter found that the incapacity had ceased and that the workman was fit to resume his former work; that since the accident incipient cataract had appeared in his other eye; and that the cataract was not due to the accident:—

Held, that on these findings the arbiter was right in ending the compensation.

APPEAL from an interlocutor of the Second Division of the Court of Session upon a case stated by the sheriff-substitute of Lanarkshire, sitting as arbiter under the Workmen's Compensation Act.

On February 18, 1910, the appellant sustained an injury to his right eye by an accident arising out of and in the course of his employment as a miner with the respondents, and as the result of the accident the eye had to be removed. He received compensation from the respondents as for total incapacity from the date of the accident till September 15, 1910, when the payments ceased. On that day the respondents instituted proceedings for a review asking the sheriff to find that the appellant's right to compensation ceased at that date or in the alternative to make an award of partial compensation. At the hearing of the application on February 13, 1911, it was proved or admitted (as stated by the sheriff-substitute in the case) that on November 12, 1910, the appellant's incapacity had ceased and he was fit to resume his former work as a miner; that the appellant had on November 12, and had at the date of the hearing, incipient cataract in his left eye; that the cataract in the left eye was not due to the accident; that incapacity for his work would result gradually from the cataract; that the appellant's condition was

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the same on September 15 as on November 12; that in the beginning of December, 1910, the appellant resumed his former work as a miner; and that his wage-earning capacity was not diminished by the loss of his right eye. On these facts the sheriff-substitute ended the compensation as at September 15, 1910.

The question of law for the opinion of the Court was whether the arbiter was right in the circumstances above stated in ending the compensation payable in respect of the accident.

The Second Division of the Court of Session (the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen) answered this question in the affirmative.

Constable, K.C., and *Alexander Moncrieff* (both of the Scottish Bar) (*Gilbert Beyfus* with them), for the appellant. The arbiter ought to have made a suspensory award. That he has power to do so is now finally established by the decision of this House in *Taylor* v. *London and North Western Ry. Co.* (1) Sched. I., paragraph 1 (*b*), of the Workmen's Compensation Act, 1906, says that in every case "where total or partial incapacity for work results from the injury" a weekly payment shall be made during the incapacity. The incapacity of the appellant is almost certain to recur, and the question is whether that is an incapacity which results from the injury. The incapacity is due to the combination of two concurrent causes, one of which is the injury by accident. The accident is the cause of the incapacity to some extent because if the natural cause alone had operated the incapacity would not arise; it does produce the resultant incapacity along with some other cause. The provision in the schedule says nothing about causa proxima and causa sine qua non, and it is submitted that the incapacity in this case does result from the injury within the meaning of that provision. *Cory Brothers & Co.* v. *Hughes* (2), though not precisely in point, lends some support to this view. In cases of negligence, where an injury results from the concurrence of negligence with some ordinary extraneous cause the negligent person is liable for the whole of the joint effect: Beven on Negligence in Law, 3rd ed., vol. i., pp. 79, 81.

(1) Ante, p. 242.

(2) [1911] 2 K. B. 738.

[LORD ROBSON. The analogy of cases of negligence cannot be relied on, because those cases proceed on the principle that everything is assumed against a wrong-doer.]

Scott Dickson, K.C. (*Dean of the Faculty*), and *Harold W. Beveridge*, for the respondents, were not called on.

LORD MACNAGHTEN. My Lords, in this case the appellant lost his right eye by an accident, and at that time there was no sign of incipient cataract in his left eye; there was nothing the matter with it. The fact is not perhaps very clearly stated by the sheriff-substitute, but I think that is the fair result of his finding. The incipient cataract only dates from November 12, 1910. The accident occurred on the 18th of February preceding. There is nothing to connect the accident with the disease. That being so, it seems to me that it is impossible to say that the award ought to have been kept open, unless your Lordships are prepared to hold that when a man being gifted by nature with two organs of vision loses one, the award ought always to be kept open on the chance of his losing the other before he becomes unfit to work or is unable to earn his livelihood.

I think that the appeal ought to be dismissed, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I concur. As I understand the case, the learned sheriff-substitute has found that this cataract is not due to the accident—that is, that it is not caused by the accident. Now the compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation. The function of the schedule is to supply a measure of damages for that compensation; but a man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets.

If the argument of the appellant were well founded, then if a man loses one eye, inasmuch as if anything happens to the other eye he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him. If that were so, there would be no finality in such a case. It is, on the other hand, quite understandable that, if a man is in a diseased condition at the time he meets with an accident, and the accident accelerates in any way his disease, that, as well as the actual physical injury directly caused by the accident, may be fairly taken into account. And if this cataract was in an incipient stage at the time when the injury to the right eye was sustained, and if that injury to the right eye accelerated the disease in the left eye, it might possibly be that the award should be kept open to meet further developments. But it appears to me—taking the finding here to be that this cataract did not exist at the time the man sustained the injury to his right eye, but that it developed subsequently, coupled with the seventh finding, "that the cataract in the left eye is not due to the accident"—that the award should not be kept open to meet the possibility of the consequences which may hereafter ensue.

Lord Shaw of Dunfermline. My Lords, in my opinion when the sheriff made his award in this case he made it as a final award, meaning to exclude from the scope of that award anything in respect of or in connection with the cataract in the left eye. I think that the finding in head 7, "that the cataract in the left eye is not due to the accident," destroys all causal link of connection between that ailment and any accident arising out of and in the course of the employment. The causal connection having been thus destroyed, it appears to me that it would be straining the statute and contrary to its provisions to apply it to a case like the present.

No question of probable or possible recurrence of the effects of an accident can arise in a case like the present, where, as I say, all causal connection between the ailment and the accident has been definitely settled not to exist.

Lord Robson. My Lords, I entirely concur.

Earl Loreburn L.C. also concurred.

Appeal dismissed.

Lords' Journals, March 12, 1912.

Agents for appellant: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[PRIVY COUNCIL.]

KHOO SIT HOH AND OTHERS . . . . . . DEFENDANTS;

AND

LIM THEAN TONG . . . . PLAINTIFF.

J. C.*
1911
Nov. 30.
1912
Jan. 23.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

Oral Evidence—Weight to be given to Opinion of Trial Judge—Duty of Court of Appeal.

Where upon an issue depending upon oral evidence there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and examined the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities.

The trial judge found that the respondent's mother was the adopted and not the natural daughter of the testator in the cause. The Court of Appeal rejected the whole of the appellants' evidence in support of the adoption as having been adduced on behalf of suitors who had acted dishonestly.

Their Lordships restored the finding of the trial judge. He had fully considered the appellants' conduct, but nevertheless believed the independent witnesses called by them in preference to those called by the respondent, and his finding was consistent with the probabilities of the case.

APPEAL from a decree of the Supreme Court (September 26, 1910) reversing a decree of Thornton J. (April 21, 1910).

The first Court dismissed the action, finding that the respondent was not next of kin to the testator and therefore not entitled to sue for a declaration of his partial intestacy and for administration of his estate. It found that his mother was not the natural daughter of the testator, but had been adopted by him. The Court of Appeal (Fisher and Lee-Braddell JJ., Jones C.J. dissenting) found that the respondent's mother was the natural daughter of the testator and decreed the suit.

The decision of this question of fact by their Lordships, which turned upon the credibility of oral evidence, involved

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* *Present:* LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

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consideration of the weight which should be properly allowed in a Court of Appeal to the opinion of the trial judge.

P. O. Lawrence, K.C., and *Sargant*, for the appellants, contended that, as the decision depended upon the credibility of the witnesses, the opinion of the trial judge, who saw, heard, and examined them, was not to be disregarded without cogent reasons. The finding of adoption rested on the evidence of four independent witnesses called by the appellants, of whose credibility the trial judge recorded that he had no doubt, but to whom the finding of the Court of Appeal attributed wilful perjury. The trial judge had not attached much weight to the evidence of the appellants themselves, but had believed their independent witnesses in preference to those called by the respondent. It was contended that his finding was consistent with the probabilities, was equivalent to the verdict of a jury, and ought not to have been overruled unless shewn to have been clearly wrong. Reference was made to *Lodge Holes Colliery Co.* v. *Wednesbury Corporation.* (1)

Macnaghten, K.C., and *Howard Wright*, for the respondent, contended that the judgments of the majority of the Court of Appeal were right in that they preferred the evidence on behalf of the respondent. None of the judgments agreed with that of the trial judge in his view of the evidence. It was contended that the conduct of the appellants threw great suspicion upon the truth of their case and that greater credence was due to the evidence for the respondent.

P. O. Lawrence, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD ROBSON. The defendants are appealing from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (Settlement of Penang) which (by a majority, the Chief Justice dissenting) reversed the judgment of Thornton J. The Court of Appeal has declared that the respondent's mother, Khoo Toon Neoh, was the natural daughter, born in wedlock, of one Boon Peh (hereinafter called "the testator"), so that the respondent is entitled, as one of the testator's next of kin, to maintain an action for the administration of the estate, and to share in the considerable property of which the testator died possessed, but which was not disposed of by his will. The contention of the appellants is that Khoo Toon Neoh was only an adopted daughter of the testator and so not one of the next of kin.

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(1) [1908] A. C. 323, 326.

The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.

Khoo Boon Peh, the testator, was a Chinaman who had come to Penang in or about the year 1888, and had since carried on an extensive business there as a money-lender and pawnbroker. While still in China he had twice been married, namely, in the year 1869 to Yeoh Quah Neoh, who died within a year leaving no issue, and next, on March 26, 1871, to Quah Sooi Neoh. By his second wife the testator had four sons, Sit Hup, Sit Hoh, Choon Hean, and Chin Tek. Sit Hup died about 1889, leaving a son, Heng Kip. There were also at least three adopted sons, namely, Sit Cheang, Sit Hum, and Choon Soo. Sit Hum predeceased the testator about 1904, leaving a son, Sin Kee. As to the alleged daughter, Khoo Toon Neoh, the respondent's case was that she was the testator's eldest child, while the appellants say that she was the daughter of a nurse called in to attend on Quah Sooi Neoh upon the birth of her second son, Sit Hoh, in the year 1873 or 1874.

Quah Sooi Neoh, the wife of the testator, died at Penang on July 20, 1906, and Khoo Toon Neoh, the alleged adopted daughter, died also at Penang in the year 1897 or 1898, leaving as her only child the present plaintiff.

The testator duly made his will on November 27, 1906, and at the same time had a partnership deed prepared, which was executed on the following day, whereby he declared that his said business was a partnership, whereof the capital belonged in the shares specified to his three surviving sons before mentioned; to an illegitimate son, Sean Leang (? or Tiang Liong), and to two of his adopted sons, Sit Cheang and Sit Hum, leaving shares amounting to $30,000 belonging to himself. His will purported to deal only with that $30,000, which he declared to be all the property he possessed. The partnership deed was retained by him until his death on April 7, 1909. No dividends or interest were paid under it during his lifetime, and it seems to have been in truth a part of his testamentary arrangements. The will has an important bearing on the case. The three natural and legitimate sons are appointed executors, and the testator goes on to make bequests of $1000 each to his seven named grandsons, $700 to a grandson in China, and $300 to three granddaughters, including one whose name he cannot remember, with the whole residue to his four surviving natural sons. If the claim of the plaintiff-respondent is good, he was, of course, a grandson of the testator, but it is not without significance that the testator does not mention him in the will.

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No reason is suggested in the evidence as to why, if the plaintiff were a natural grandson, he should have been wholly ignored in the will. A bequest is made to one grandson, Sin Kee, who was only a son of an adopted son, but his father, Sit Hum, was an active worker in the testator's business, whereas the plaintiff's mother had been dead some years, and if he were only a grandson by adoption, the nominal tie of relationship might more easily have weakened. Anyhow, it cannot be said that the testator treated the plaintiff quite as one would expect the son of a natural and only daughter would be treated.

The action was originally brought by the present plaintiff, the surviving adopted sons of the testator, namely, Sit Cheang and Choon Soo together with Sin Kee (son of Sit Hum deceased), and Heng Kip. The statement of claim alleged that Sit Cheang and Sit Hum were natural sons of the testator by his first wife. The evidence on both sides shews clearly that this was untrue. The claim also alleged that Choon Soo was a natural son of the testator and his second wife. That allegation also seems to have been false. The action having been begun on August 27, 1909, and entered for trial on November 22, 1909, all the plaintiffs, other than the respondent, settled with the appellants, and on January 12, 1910, discontinued the action so far as they were concerned. None of the plaintiffs who thus discontinued gave evidence at the trial for either side.

The witnesses were not numerous. The first witness for the plaintiff was Lim Kim Yong, the plaintiff's father and next friend, who had married Khoo Toon Neoh in or about the year 1887, when he was eighteen years old. He was a nephew of the testator and had known Khoo Toon Neoh since she was five or six years old, and he was six or seven. He had lived about a mile from her house and they had been playmates together. The wedding is described by him and also by one of the appellants' witnesses as a "grand ceremony." About 100 persons were present at the feast in the bridegroom's house. Some stress is laid by the Court of Appeal on this and on the fact that the bridegroom's mother was present, the suggestion being that had the bride been the daughter of a nurse the husband's mother would probably have discountenanced the marriage, but that

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seems to be scarcely a strong enough ground for any inference one way or another. It is, however, of great importance that the husband swears that he never heard of his wife being an adopted daughter until the statement of defence. Considering that his mother was the testator's sister and must have been well acquainted with the testator's wife it is practically certain that the adoption could not take place without her, the testator's sister, hearing of it, and it is difficult to believe she would not pass the information on to her son. The learned trial judge, however, says that "having regard to the way in which adopted children in China are received into the family and treated in practically all respects as other members of the family, it seems to me quite possible that at the time of his marriage and subsequently, Lim Kim Yong may never have known that his wife was not a natural daughter of Khoo Boon Peh." The learned judge is careful not to reflect adversely on the veracity of Lim Kim Yong, and this makes a strong point, and is indeed the main point, in the respondent's favour. In 1891 or 1892 Lim Kim Yong left for Penang, and his wife followed him two or three years later. In Penang, Lim Kim Yong and the testator had business relations, and on the testator's death the executors brought an action against him for $5000, which he met by a counter-claim for $8000.

The next witness, Tian Chong, was an old man of seventy who had been a near neighbour of the testator in China. He said the testator's first child was a daughter. He saw it as a little baby two or three times, but about six months after its birth he left for Siam, where he stayed for eighteen years, and then returned to China. This cannot be called very weighty evidence. The witness is not quite accurate about his dates, but putting that aside as being common to nearly all the witnesses in the case, one may be permitted to treat with some reserve the recollection of a man as to the sex of a neighbour's baby which he saw two or three times about forty years ago.

Then comes Lim Kim Tuan, fifty-one years old, the elder brother of Lim Kim Yong. He remembers the testator marrying Quah Sooi Neoh, and says the first child was a girl. According to his account his mother was sent for to the confinement, and he, being then ten years old, followed her to the house. He remembers the child's name, and saw her many times before he left for Penang, which he did when he was nineteen years old.

Except for another witness, whose evidence was unimportant, this was the whole of the plaintiff's case. Lim Kim Tuan's evidence was direct, and, of course, if true, was conclusive, but even in his case there was, perhaps, room for mistake or confusion of memory as to the sex of an infant born so long ago, especially if a little later on, and while he was still a young boy, he became acquainted with the baby girl said to have been introduced into the family. However, this evidence, meagre though it may be, is, when considered along with Lim Kim Yong's statement that he married and lived with his wife as being the testator's natural daughter, quite sufficient to establish the plaintiff's case, unless rebutted by clear and credible testimony.

The defendants' case rested partly on verbal testimony and partly on documents. It is convenient first to deal with the story told by the witnesses, and then to consider the documents which are a crucial element in the case.

The defendants, Sit Hoh and Choon Hean, said they had heard their father tell people which of the children were adopted, and that he included Khoo Toon Neoh among them.

Khoo Boon Chye (fifty-one years old) described himself as a younger brother of the testator, though he was described in the pedigree book as an adopted son of the testator's father. He was one of six brothers, and they all lived in the family house, some of them apparently with wives and children. He remembered the birth of Sit Hup, who, he says, was the first child. He also remembered the birth of Sit Hoh, and said that a nurse named Kwek attended the child. She had two sons and a daughter with her, and Quah Sooi Neoh, having no daughter of her own, asked her to let her adopt the female child. The nurse agreed, and thus Khoo Toon Neoh is said to have entered the family, being known as "Teo."

A widow named Khoo Chin Neoh (fifty-seven years old), who was a sister-in-law of Quah Sooi Neoh, was next called. She tells the same story about the nurse and "Teo," and says that she was consulted as to the adoption and advised it. She differs from Boon Chye in describing the nurse as having two daughters and one son instead of two sons and one daughter. When these two witnesses were cross-examined as to how old they were on the various occasions of which they spoke, their recorded answers as to ages and dates did not always appear to fit in with the probable date of Sit Hoh's birth. The two learned judges who formed the majority of the Court of Appeal animadverted very strongly on this circumstance and find in it a reason for treating these witnesses as wholly fraudulent. The Chief Justice, however, points out that the discrepancies, such as they were, were not incapable of explanation, and he draws attention to the words of the trial judge, who says: "There was nothing elicited in the course of the examination of the four witnesses for the defence to raise a doubt in my mind that they were speaking the truth or to suggest that they had been induced by the defendants to come to Court and deliberately give false evidence."

It is worthy of note that a similar discrepancy occurs in the evidence of Lim Kim Tuan, who was the mainstay of the plaintiff's case. He says he was nine years old when the testator married again, which would put the date of his visit to her on the occasion of Khoo Toon Neoh's birth in 1869, whereas the marriage did not take place till 1871. Probably very little reliance was placed by either side at the trial on these conjectures as to dates, though their discrepancies could not fail to be observed.

The next witness was a trader, an old neighbour and friend of the testator's family. He says Sit Hup was the eldest child and gives in detail an interview with the testator on the proposed adoption of Khoo Toon Neoh, who was about three or four years old.

Then came Khoo Heng Poh, who was trustee and headsman of the testator's clan. His evidence is, at least, explicit and precise. He had known the testator from his youth; they were near neighbours, and, like the testator, this witness had also moved from China to Penang. He remembered the birth of Sit Hup, who he says was the first child; he remembered also the birth of Sit Hoh and the adoption of "Teo," and recounted what the testator told him about that event.

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The learned trial judge heard and believed this evidence as to the adoption. The Court of Appeal rejected it on the ground that the defendants were proved to be guilty of falsehood in relation to certain documents so as to raise a reasonable suspicion that their case was wholly dishonest, and that being so, their witnesses were probably suborned, and the alleged discrepancies as to dates sufficed under such circumstances to discredit them altogether.

The defendants at the trial produced two important documents—(1.) a pedigree book containing an entry of the purchase and adoption of Khoo Toon Neoh, and (2.) a partnership deed in which the testator disposed of the shares in his business which constituted the greater part of his wealth.

The pedigree was said to be in the testator's handwriting, though the evidence as to this was conflicting. It contained an account of his marriages and children, distinguishing between natural children and those that were adopted. The page in dispute is headed "17th generation, Boon Peh," and after mentioning the first marriage goes on: "Subsequently on the sixth day of the second moon in the Sin Bi year (26th March 1871) re-married maiden Kua begot four sons, Sit Hap, Sit Ho, Choon Hien, and Choon Tiat: bought and adopted three sons, Sit Cheang, Sit Ham, and Choon Su; also bought one daughter who was married to the Lim family; servant girl, Muih Ah, begot one son, Tiang Liong."

The reference to the daughter who was bought and afterwards married to the Lim family was said by the plaintiff's witnesses to be an interpolation after the succeeding line about the servant girl had been written. The trial judge himself was disposed to adopt that view. The "interpolation" is not an interlineation and it is not easy, on inspection, to be sure that it was inserted out of due order. The point, however, does not seem to be of great importance when it is remembered that, apart from the disputed entry, the book itself is not found to be a forgery. Indeed the finding that there was a forged interpolation impliedly affirms the pre-existence of the book as an otherwise genuine document. Fisher J. even appeals to it for corroboration on one point, and says it "is not shewn to have been tampered with here." In this view, the silence of the pedigree book as to the birth of any daughter seems to be almost as significant as its disputed utterance about the adoption.

The main ground, however, on which the majority of the Court of Appeal have acted in rejecting the whole of the evidence given for appellants is their conduct in the early stages of the case in regard to the disclosure of the partnership deed. That document was found with the will a few days after the testator's death, but the appellants put forward an unsigned draft of the document as all they possessed, and it is found by the trial judge that, for some time (until after they had settled with the plaintiffs who have discontinued), acting on some fraudulent motive, they withheld the original document although they disclosed it before the trial. So far as the claim of the present plaintiff is concerned, the partnership deed did the defendants no harm. On the contrary, it was to some extent in their favour, as it shewed a certain discrimination between the adopted and the natural sons, but the conduct of the defendants argued strongly that they were not honest men and were presumably capable of suborning the witnesses they had called. The trial judge fully considered these circumstances, but nevertheless believed the defendants' independent witnesses in preference to the witnesses called for the plaintiff. Their Lordships, after carefully reviewing all the probabilities of the case, are not prepared to say he was wrong. Although the plaintiff began with a prima facie case, he did not meet the case against him. He called no witnesses from the large family group (six brothers and their families) who lived in the family house with the testator when the eldest child of the latter was born; although in China a record of births is said to be kept by the head of the district, no attempt was made to meet the case set up by the pedigree book by shewing whether there was any official record of the alleged daughter's birth, and, finally, there was the significant action of the testator himself in relation to his will and business arrangements, which were certainly not consistent with his recognition of the plaintiff as his natural grandson.

Even without taking the pedigree book into account, these circumstances are of great cumulative effect. They go far to

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support the impression the trial judge formed as to the comparative credibility of the respective groups of witnesses and to justify him in the conclusion at which he arrived.

Their Lordships will, therefore, humbly advise His Majesty that the judgment appealed from should be reversed and the judgment of Thornton J. restored; each party paying their own costs of the appeal to the Court of Appeal and no order being made as the costs of this appeal.

Solicitors for appellants: *Loughborough, Gedge, Nisbet & Drew.*
Solicitors for respondent: *Budd, Johnson & Jecks.*

[PRIVY COUNCIL.]

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CITY OF MONTREAL . . . . APPELLANTS;

AND

MONTREAL STREET RAILWAY . . . . RESPONDENTS;

ATTORNEYS-GENERAL FOR CANADA AND QUEBEC . . . . INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Railway Act of Canada (1906, *R. S. C., c.* 37), *s.* 8, *sub-s.* (*b*), *ultra vires—Provincial Railways—Jurisdiction of Board of Railway Commissioners.*

Held, that s. 8, sub-s. (*b*), of the Railway Act of Canada (1906, R. S. C., c. 37), which subjects any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is ultra vires of the Dominion Parliament.

An Order dated May 4, 1909, of the Board of Railway Commissioners for Canada (created by Dominion Railway Act 3 Edw. 7, c. 58, and beyond the jurisdiction and control of any province) directed with regard to through traffic over the Federal Park Railway and the provincial street railway, both within and near the city of Montreal, that the latter should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out its provisions with respect

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal line :—

Held, that the said Order so far as it related to the provincial street railway was made without jurisdiction.

APPEAL by special leave from a judgment of the Supreme Court (March 11, 1910) reversing a judgment of the Board of Railway Commissioners for Canada (May 4, 1909).

The respondents' railway was constructed and is operated under special Acts of the Province of Quebec.

The Montreal Park and Island Railway was originally constructed and operated under provincial legislation, but was declared by the Parliament of Canada (57 & 58 Vict. c. 84, amended by 59 Vict. c. 28 and 6 Edw. 7, c. 129) to be a work for the general advantage of Canada, and is accordingly now subject only to the Parliament of Canada.

The lines of the two railways are physically connected at different points, both within and near the limits of the city of Montreal, and arrangements exist between them for the traffic of passengers and their continuous passage from points on the line of each to points on the line of the other. The cars of each railway also run over the tracks of the other.

Upon a complaint made to them by the city of Montreal, the Board of Railway Commissioners for Canada found (and under the Railway Act, s. 54, sub-s. 3, their finding was binding and conclusive) that the Federal railway above mentioned unjustly discriminated against the residents of Mount Royal Ward in the city of Montreal and in favour of the residents of the town of Notre Dame de Grace in respect of rates charged, and ordered it to grant the same facilities at the same rates to both classes of residents. It further ordered that with respect to through traffic over the respondents' railway the latter " be, and it is hereby required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this Order."

Under the said s. 54, sub-s. 3, the respondents obtained leave to appeal to the Supreme Court on a question (set out in their Lordships' judgment) as to the jurisdiction of the Board to make the Order as against them.

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The Supreme Court by a majority held that the said s. 8 is ultra vires of the Parliament of Canada in so far as sub-s. (*b*) is concerned. Duff J., who delivered its judgment, agreed with the minority that a provincial railway may be affected by Dominion legislation necessarily incidental to legislation affecting Dominion railways; and he instanced the passing of regulations touching traffic through the point of intersection of a Dominion and a provincial railway and the surrounding area. He said: "To the extent of that necessity we are justified in implying a power to the Dominion to legislate for the provincial railways notwithstanding the circumstances that, broadly speaking, the exclusive legislative jurisdiction in respect of the provincial railways has been committed to the province; but the implication must, I think, be limited by this necessity." He considered that legislation respecting through traffic—involving the subjection of a provincial railway to the Railway Board—is not necessarily incidental to the exercise of the legislative powers of Parliament respecting a connecting Dominion railway. The power to legislate wholly with regard to through traffic need not be vested in a single authority; for "divided legislative authority is the principle of the British North America Act, and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division, that is the end of the federal character of the Union."

Davies and Anglin JJ. dissented, being of opinion that legislation regarding through traffic was necessarily incidental to Dominion railway legislation.

Atwater, K.C., for the appellants, contended that s. 8, sub-s. (*b*), of the Railway Act (R. S. C., 1906, c. 37) is intra vires of the Parliament of Canada. Its provisions are necessarily incidental or ancillary to subjects of legislation assigned exclusively to that Parliament by the British North America Act, 1867, that is to federal railways and the regulation of trade and commerce. Through traffic from a federal to a provincial railway is not a local work or undertaking within the meaning of s. 92, sub-s. 10. If a provincial railway deals in through traffic in agreement

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with a federal railway the jurisdiction over it must necessarily vest in the Dominion Parliament and cannot vest in the provincial Legislature. Not being within the exclusive power of the province, it must fall within the residuary powers of the Dominion. Otherwise it is not subject to any single legislative control. Reference was made to the Act of 1867, s. 91, sub-ss. 29 and 39; *Valin* v. *Langlois* (1); *Cushing* v. *Dupuy* (2); *Citizens Insurance Co.* v. *Parsons* (3); *Bank of Toronto* v. *Lambe* (4); *Attorney-General of Ontario* v. *Attorney-General of Canada* (5); *Union Colliery Co. of British Columbia* v. *Bryden* (6); *Attorney-General for Ontario* v. *Attorney-General for Canada* (7); *Canadian Pacific Ry. Co.* v. *Corporation of Notre Dame de Bonsecours* (8); *Grand Trunk Ry. Co.* v. *Attorney-General of Canada* (9); *Madden* v. *Nelson, &c. Ry. Co.* (10); *Toronto Corporation* v. *Canadian Pacific Railway* (11); *Tennant* v. *Union Bank of Canada.* (12)

Newcombe, K.C., for the Dominion of Canada, whose Attorney-General intervened by special leave for the purpose only of maintaining its legislative authority to enact the sub-section impugned. He contended that it affected the peace, order, and good government of Canada within the meaning of s. 91 in relation to matters not exclusively assigned to the provinces; and also that it was in pursuance of an exclusive power to legislate with regard to the regulation of trade and commerce. Its admitted powers over the Federal railway in these respects involved the right to deal with the provincial railway and could not be effectively exercised without it. Through traffic by two railways, one of which is federal, cannot be carried on upon terms inconsistent with the Railway Act. It cannot be regulated by the local Legislature and therefore must be governed by the paramount powers of the Dominion. Through traffic is not local and private, and when it affects Dominion railways becomes of such dimension irrespective of its actual character and volume

(1) (1879) 5 App. Cas. 115, 118.
(2) (1880) 5 App. Cas. 409, 415.
(3) (1881) 7 App. Cas. 96, 109.
(4) (1887) 12 App. Cas. 575, 579.
(5) [1894] A. C. 189, 200.
(6) [1899] A. C. 580, 585.
(7) [1896] A. C. 349, 359, 366.
(8) [1899] A. C. 367, 377.
(9) [1907] A. C. 65, 67.
(10) [1899] A. C. 626.
(11) [1908] A. C. 54.
(12) [1894] A. C. 31.

as to affect the body politic of Canada and necessarily falls within the authority of its Parliament. He referred to *Gibbons* v. *Ogden* (1), per Marshall C.J., as to regulation of trade and commerce; *Kidd* v. *Pearson* (2); *Norfolk and Western Railroad Co.* v. *Pennsylvania* (3); *Hanley* v. *Kansas City Southern Ry. Co.* (4) He also referred to *Union Colliery Co. of British Columbia* v. *Bryden* (5) and *Hodge* v. *The Queen.* (6)

Sir R. Finlay, K.C. (*F. E. Meredith, K.C.*, and *G. Lawrence* with him), for the respondents, contended that it was not necessarily or even reasonably incidental to the exercise of legislative power over a Dominion railway to legislate for through traffic between it and a provincial railway whilst that traffic is on the provincial railway. It has not been made out that control over the Dominion railway is rendered ineffective without this latter power. The sub-section in question does not deal with the control of the Dominion railway or the traffic thereon. It purports to control the traffic on a provincial railway. The power of the Dominion to reduce rates on the Federal railway is not disputed, and it can exercise that power without at the same time reducing rates on the respondents' railway. That railway is a local work within s. 92, sub-s. 10, of the Act of 1867. It does not connect any two provinces. It has not been declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces. The section in question ought to be applied only to provincial railways which connect with railways extending beyond the limits of the province. The respondents' railway is situate wholly within the province. The two railways connect at points within the province. Neither of them is authorized to construct lines or other works outside the province, and neither of them connects with any railway outside the province. He referred to s. 92, sub-s. 10, and to *Attorney-General for Ontario* v. *Attorney-General for Canada* (7), which for the first time introduced the test of national importance, and the Railway Act, s. 26,

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(1) (1824) 22 U. S. 1, 68, 78.

(2) (1888) 128 U. S. 1.

(3) (1890) 136 U. S. 396.

(4) (1903) 187 U. S. 617.

(5) [1899] A. C. 585.

(6) (1883) 9 App. Cas. 117, 130.

(7) [1896] A. C. 349, 360.

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sub-ss. 1 and 2, s. 264, and s. 284, sub-ss. 1, 2, 3. The argument in favour of the appeal involves the bringing of all these provisions which relate to through traffic to bear on all provincial railways which are in any way connected, however slightly, with a Dominion railway.

Geoffrion, K.C. (*Hamar Greenwood* and *Horace Douglas* with him), for the Attorney-General of Quebec, argued to the same effect.

Newcombe, K.C., replied.

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The judgment of their Lordships was delivered by

Lord Atkinson. This is an appeal by special leave from a judgment of the Supreme Court of Canada pronounced upon March 11, 1910, whereby an appeal from a certain Order of the Board of Railway Commissioners for Canada, dated May 4, 1909, was allowed, the said Order set aside, and it was declared that the said Commissioners had no jurisdiction to make the Order appealed from.

The facts of the case are few and are undisputed.

There are in the city of Montreal and the adjacent township two so-called railways. One of these is the Montreal Park and Island Railway, hereafter styled for convenience the Park Railway, and the other the Montreal Street Railway, which is in fact a tramway laid along the streets of that city and its suburbs, and for convenience may be styled the Street Railway. These railways being constructed on the island in the St. Lawrence on which the city of Montreal stands are, of course, situate wholly within the Province of Quebec. They connect physically at several points both within and near the limits of the city, and arrangements have been entered into between the companies owning them by which the cars of each railway run over the lines of the other, and passengers are conveyed from points on one system to points on the other over the permanent way of both. It is not disputed that there is conducted over these lines "through traffic" within the meaning of the statute hereinafter referred to.

The Park Railway, though originally constructed and worked under the powers conferred by certain enactments of the provincial Legislature, was, by a statute of the Canadian Parliament (57 & 58 Vict. c. 84), amended by two other similar statutes (59 Vict. c. 28 and 6 Edw. 7, c. 129), declared to be a work for the general advantage of Canada. Railways so declared were in this case called "federal" railways to distinguish them from railways situate wholly within a province, and under the exclusive control of the provincial Legislature styled provincial railways. It is admitted that by this declaration the railway to which it refers was withdrawn from the jurisdiction of the provincial Legislature, that it passed under the exclusive jurisdiction and control of the Parliament of Canada, and, small and provincial though it was, stood to the latter in precisely the same relation, as far as the enactments upon the true construction of which this case turns, as do those great trunk lines, also federal railways, which traverse the Dominion from sea to sea, and were originally constructed and are now worked in exercise of the powers conferred by the statutes of the Parliament of the Dominion of Canada. The Board of the Railway Commissioners was created by a Dominion statute (3 Edw. 7, c. 58) entitled "The Railway Act." The Commissioners are officials of the Dominion Government, and in the exercise of their powers are outside the jurisdiction and beyond the control of any provincial Legislature or Government.

A complaint having been made to them that an unjust discrimination had been made by the Park Railway Company in respect of the rates charged and of the service and operation of this railway between the residents of a certain ward in the city of Montreal, named the Mount Royal Ward, and the residents of an outlying township, named the town of Notre Dame de Grace, in both of which localities they have stations, the Order appealed from was made. It purported to have been made under the authority and by virtue of the powers conferred upon the Commissioners by the Railway Act. By it they directed, first, that the Park Railway Company should grant the same "facilities in the way of services and operation including the rates to be charged by it," to the people residing in Mount Royal Ward as it grants to those residing in Notre Dame de Grace, and that it should forthwith enter into the necessary agreements for the purpose of removing the unjust discrimination which they had found in fact to exist; and, secondly, that with respect to "through" traffic over the Street Railway, the Street Railway Company should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out the provisions of this Order.

The Park Railway having by statutory declaration become in the manner mentioned a federal railway, it is admitted that the first portion of this Order dealing with the "unjust discrimination" which it was found to have made was intra vires, but the validity of the second part of the Order is challenged, and it has, on behalf of the Street Railway Company, been from the first insisted that the Commissioners had no jurisdiction whatever to make it.

Moreover, it is practically not disputed that the existence in the Commissioners of the jurisdiction challenged depends itself upon this further consideration, namely, whether, having regard to the provisions of the 91st and 92nd sections of the British North America Act, the Parliament of Canada have any jurisdiction, power, or authority, express or implied, to enact the 8th section of the before-mentioned Railway Act so far as it affects provincial as distinguished from federal lines. This was in effect the question of law raised by way of appeal from the Order of the Commissioners for the decision of the Supreme Court. It is by the Order of the former body, dated June 8, 1909, framed thus: "Whether upon the true construction of sections 91 and 92 of the British North America Act, and of section 8 of the Railway Act of Canada, the Montreal Street Railway is subject in respect of its through traffic with the Montreal Park and Island Railway Company, to the jurisdiction of the Board of the Railway Commissioners of Canada."

It is to be observed that the question is framed in a general form. The jurisdiction of the Commissioners or of the Dominion Parliament is not made to depend in any way on the character, nature, or volume of the "through" traffic. Nor upon the question whether it is of such a kind as to confer special advantages upon Canada or upon two or more of its provinces. And, indeed, counsel on behalf of the appellants at the hearing before their Lordships boldly contended that once a line of railway, though wholly provincial, i.e., situate wholly within one particular province, and not federal, connects with a federal line, and "through" traffic is conducted over both, the jurisdiction of the Commissioners attaches at least so far as this "through" traffic, whatever its character or amount, is concerned.

The Supreme Court by a majority of its members answered the question so put to them in the negative. The question for the decision of their Lordships is whether their answer is right in point of law.

The 8th section of the Railway Act runs as follows:—

"Every railway, steam, or electric street railway or tramway, the construction or operation of which is authorised by special Act of the Legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to—

"(*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;

"(*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;

"(*c*) Criminal matters, including offences and penalties; and

"(*d*) Navigable waters:

"Provided that, in the case of railways owned by any provincial Government, the provisions of this Act with respect to through traffic shall not apply without the consent of such Government."

It will be observed that if the argument of the appellants be right this section would seem to subject a provincial railway authorized by an Act of the provincial Legislature to all the provisions of this statute of the Canadian Parliament dealing not only with the physical connection or crossing of the two lines and with the through traffic, but also with criminal matters, offences, and penalties, whether connected with the through traffic or not, and further with the relations of the provincial line and its traffic with navigable waters. As to all these matters the jurisdiction and control of the local Legislature is superseded or overborne, comparatively little is left to that authority, and the line itself is placed in this unfortunate position, that its local traffic is put under the jurisdiction and control of the provincial Legislature and the officials of the local Government, and its through traffic, with all these other matters, is subjected to the jurisdiction and control of the Dominion Legislature and the officials of the Dominion Government. A most unworkable and embarrassing arrangement.

Now the effect of sub-s. 10 of s. 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*), and (*c*) of it into s. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament.

These two sections must then be read and construed as if these transferred subjects were specially enumerated in s. 91, and local railway as distinct from federal railway were specifically enumerated in s. 92.

The matters thus transferred are:

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the province with any other province or provinces, or extending beyond the limits of the province.

(*b*) Lines of steamships between the province and any British or foreign country.

(*c*) Works, wholly situate within the province, but declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces.

These works are physical things, not services. The appropriate number of the group would probably be 29 or 29 (*a*). It has accordingly been strongly urged on behalf of the respondents that if it be desirable in the interest of the Dominion to place the through traffic on a provincial line, such as the Street Railway, under the control of the Railway Commissioners, owing to its nature, character, or amount, the proper course for the Dominion Parliament to take, and the only course it can legitimately take, is by statutory declaration to convert the provincial line into a federal line, thus removing it from the class of subjects placed under the control of the Legislature of the province, and placing it amongst the classes of subjects over which it has itself exclusive jurisdiction and control. And further, that there is nothing in the British North America Act to shew that such an invasion of the rights of the provincial Legislature, as is necessarily involved in the establishment of this embarrassing dual control over their own provincial railways, was ever contemplated by the framers of the British North America Act. It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1)—(1.) that the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by the 16th sub-section of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2.) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by s. 92; (3.) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4.) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order, and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

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(1) [1896] A. C. 348.

It follows, therefore, that the Act and Order if justified at all must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of s. 91. Well, the only one of the heads enumerated in s. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (*a*), (*b*), and (*c*) of sub-s. 10 of s. 92. Lines such as the Street Railway are not amongst these.

In other words, it must be shewn that it is necessarily incidental to the exercise of control over the traffic of a federal railway, in respect of its giving an unjust preference to certain classes of its passengers or otherwise, that it should also have power to exercise control over the "through" traffic of such a purely local thing as a provincial railway properly so called, if only it be connected with a federal railway. The Commissioners have by the 317th section of the Railway Act vast powers over federal railways. They can compel the companies who own such lines to make all the arrangements therein mentioned for receiving and forwarding traffic of all kinds, through or local, and also compel them to conduct their business so as not to give an unjust preference to any person or persons or body or bodies corporate; but it is not to be assumed that the provincial railway companies would in the reasonable conduct of their business refuse to make such agreements with federal railway companies as would enable the latter to discharge the obligations which might be placed upon them under this section, and still less is it to be assumed that the provincial Legislature would fail to exercise their own legislative powers to compel recalcitrant companies over which they had control to enter into such agreements if they refuse to do so. As long as it is reasonably probable that the provincial companies will enter into such agreements, or will be coerced to enter into them by the provincial Legislature which controls them, it cannot be held, their Lordships think, that it is necessarily incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into these agreements in the manner in which it sought to coerce the Street Railway Company in the present case to enter into the agreements specified in the order appealed from. There is not a suggestion in the case that the "through" traffic between this federal and this local line, or between any other federal or local line, had attained such dimensions before this Railway Act was passed as to affect the body politic of the Dominion. If it had been so, the ready way of protecting the body politic was by making such a statutory declaration in any particular case or cases as was made in reference to the Park line. The right contended for in this case is in truth the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences, this dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the Legislature of the Province of Quebec.

One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature because that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the "through" traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

On the whole, therefore, their Lordships are of opinion that s. 8, sub-s. (*b*), of the Railway Act is, as regards provincial lines of railway properly so called, ultra vires (upon the other sub-sections it is unnecessary to express any opinion); that the Order of the Commissioners of May 4, 1909, was, in respect of its second part, made without jurisdiction; that the decision of the Supreme Court was right, and that this appeal should be dismissed with costs. The intervenants will pay any costs incurred owing to the interventions. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Botterell & Roche.*

Solicitors for Attorney-General of Canada: *Charles Russell & Co.*

Solicitors for Attorney-General of Quebec: *Withers, Bensons, Birkett & Davies.*

[PRIVY COUNCIL.]

J. C.*
1911
Dec. 1, 15.
1912
Jan. 26.

IN THE MATTER OF MOSES AMADO TAYLOR.

ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE.

Practice—Removal of a Barrister's Name from the Court Rolls rescinded—Irregularities without Evidence of Fraud.

By three orders of the Supreme Court of Sierra Leone the appellant was fined for contempt of Court and forgery and his name was removed from the roll of barristers and solicitors of the said Court:—

Held, that these orders must be reversed and the fines returned. Procurement of a warrant for arrest from a criminal Court, unless tainted by fraud, is not a contempt of the civil Court which had previously refused to grant it. Nor is the substitution in subpœnas without intent to defraud of names of witnesses whose evidence is bona fide required for names of those who are discovered to know nothing of the case sufficient to establish the offence of forgery.

APPEAL by special leave from three orders of the Supreme Court (September 3, 1908, May 7 and May 10, 1909).

These orders and the proceedings which led to them are detailed in their Lordships' judgment. The first of them, imposing a fine for contempt of Court, was founded on a judgment to the effect that certain criminal proceedings for which the appellant was responsible were not bona fide, but a gross abuse of the process of the Court, committed for the purpose of prejudicing the trial of a civil action then pending and part of a scheme to extract money from the defendant thereto. The second was made after an information against the appellant under s. 59 of the Supreme Court Ordinance, 1904, charging him in substance with altering two copies of a subpœna with intent to defraud, serving such altered copies with the like intent, and uttering forged subpœnas with intent to defraud knowing that they were forged; and under this order the appellant paid a fine. By the third order his name was under s. 56 of the said Ordinance struck off the roll of the Court.

Sir R. Finlay, K.C., *Daniel Warde*, and *Parikh*, for the appellant, contended that these three orders should be reversed.

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* *Present:* LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

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The institution of the criminal proceedings was not a contempt of Court. If malicious or without reasonable and probable cause the party aggrieved has a civil remedy. On the evidence they did not influence improperly a pending action. Reference was made to *Onslow and Whalley's Case.* (1) The alterations of the names, addresses and occupations, and dates in two subpœnas were at the utmost unintentional breaches of unwritten rules of the Master's office. Subpœnas are usually taken out in blank, and if a mistake as to an inserted name has been made, it is not forgery within the meaning of s. 59 of the Supreme Court Ordinance of 1904 to correct it. Reference was made to Short and Mellor's Practice of the Crown Office, 2nd ed., p. 407, to the effect that names may be inserted in subpœnas after issue; Notes in Annual Practice, 1911, Order XXXVII., p. 582; Taylor on Evidence, 10th ed., vol. 2, par. 1835; *Wakefield* v. *Gall.* (2) The order was irregular, being founded not exclusively upon the conduct proved in the case, but, as stated by the Chief Justice, also upon "previous conduct in other professional matters" not specified or investigated.

Sir Rufus Isaacs, A.-G., and *Rowlatt*, for the respondents, that is, the judges of the Supreme Court and the Colonial Attorney-General, contended that there was ample evidence that the offences charged against the appellant were committed with intent to defraud and were not mere unintentional breaches of practice rules. The orders appealed against were based throughout upon a finding of irregular professional conduct with intent to defraud.

Sir R. Finlay, K.C., replied.

1912 *Jan. 26.*

The judgment of their Lordships was delivered by

LORD ROBSON. The appellant Moses Amado Taylor is a native of Freetown, in the Colony of Sierra Leone, and a barrister of the Honourable Society of Gray's Inn, where he was called to the Bar in June, 1907. He was afterwards enrolled as a barrister and solicitor of the Supreme Court of the said Colony, and he now appeals from three orders of that Court.

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(1) (1873) L. R. 9 Q. B. 219, 230.

(2) (1817) Holt, N. P., p. 526.

By the first of those orders, dated September 3, 1908, he was fined 100*l.* and costs for an alleged contempt of Court; by the second, dated May 7, 1909, he was fined 20*l.* in respect of an alleged forgery in the case of *Rex* v. *Ganson;* and by the third, dated May 10, 1909, his name was removed from the roll of barristers and solicitors of the said Supreme Court.

On May 6, 1908, the appellant, acting professionally for one Michael Huggins, commenced an action in the Circuit Court of the Protectorate wherein the plaintiff Huggins, who was a native railway pointsman in the service of the Sierra Leone Government, sued one George Wright, who was a foreman platelayer in the same employ, for damages for an alleged assault by shooting on January 30, 1908, at Kangahun, in the Protectorate. When the action was begun Huggins had been dismissed from his employment, and on June 20 the appellant wrote to Wright saying that if his client had not been peremptorily dismissed from work he would have advised him to drop the matter, and offering at the same time to settle it if Wright would agree to pay his client's wages for the six months' employment he had lost (amounting to about 10*l.*) and costs. He further stated that if these terms were refused he would apply for the Governor's fiat to have the action tried in Freetown before he (Wright) left the Colony.

No notice was taken of this letter.

On August 22, 1908, the appellant applied to the Acting Chief Justice under s. 2 of the Debtors' Ordinance, 1883, for a warrant for the arrest of Wright on the ground, which was true, that he was about to leave the settlement. The appellant at the same time stated that if Wright would settle on the terms before suggested his client would be satisfied. The Acting Chief Justice refused this application, because, as he states in his judgment delivered on September 3, 1908, he "saw that all he (appellant) wanted was to get some money out of Wright and to use the warrant as a lever."

On August 24, 1908, an application was made on the information of Huggins to one of the police magistrates, Mr. Vergette, at Freetown, for a warrant for the arrest of Wright upon a criminal charge of assault, with intent to murder, on January 30, 1908, and a warrant was issued accordingly. As the magistrate who granted it had no jurisdiction over matters arising in the Protectorate except under the authority of the fiat of the Governor, which was wanting in this case, this warrant was in excess of his jurisdiction. Afterwards, in the proceedings for the contempt, the magistrate stated that "In granting the warrant, I was misled by the information, which did not go to shew that the offence was committed in the Protectorate; it was brought to me while I was on the Bench."

The information was silent as to the place where the alleged assault was committed, but it so happens, however, that the warrant itself explicitly states that the offence took place at Kangahun in the Protectorate, a circumstance which must have been communicated by the appellant or Huggins. There does not appear, therefore, to have been any concealment or deceit on the part of the applicant, though there may have been inadvertence on the part of the magistrate. The warrant was duly executed, and on August 25, 1908, Wright was brought before the magistrate. The appellant appeared for Huggins, the prosecutor, and at once asked the Court to remand Wright so that he (the appellant) might apply to his Excellency the Governor to obtain a fiat to give the magistrate jurisdiction. The magistrate had, under the circumstances, no jurisdiction at all, and very properly refused that application, whereupon Wright was discharged.

On August 27, 1908, a summons was issued by the Acting Chief Justice and served on the appellant, calling on him to appear and shew cause why an attachment should not issue against him for contempt of the Circuit Court of the Protectorate in causing Wright to be illegally arrested "in gross contempt and defiance of the refusal of the judge of the said Court on the 22nd August, 1908, to issue a warrant for the arrest" of Wright.

The summons was heard on August 29 and 31, 1908, by the Acting Chief Justice, who called and examined Wright, and the magistrate, Mr. Vergette. The sole question then to be determined was whether or not the prosecution and arrest of Wright was a contempt of Court. The Acting Chief Justice came to the conclusion that it was. He was of opinion that the appellant and Huggins resorted to the criminal proceedings and procured the illegal arrest as a mere lever to get the money they were demanding from Wright.

"The whole proceeding," said the learned judge, "was simply an abuse of a process of justice," and he adds, "I am satisfied that the contemnors, in initiating their criminal proceedings, were influenced by the intention of defying me for having refused them the civil warrant of arrest they applied for, and Taylor in particular had this object in view, for when I refused him the warrant, he became impudent and threatened to complain to the Secretary of State. . . . . Even if the warrant had been valid, a contempt would have been committed, and the illegality of the warrant only intensifies the contempt."

It was the recourse which this solicitor had, on behalf of his client, to another tribunal and a different process, in order to get what the learned judge had decided he was not entitled to have, which constituted, in the learned judge's view, the essence of the contempt.

It is true that the learned judge found as a fact that the appellant was not acting in good faith, but the sense in which that charge is put forward needs some explanation. It is not suggested, or certainly there is no evidence to support such a suggestion, that Huggins did not believe in the justice of his claim and did not so instruct his lawyer. It was indeed pointed out by the learned judge that the alleged assault was seven months old, and that if the contemnors had been acting in the interests of justice they would have taken their proceedings earlier, but mere delay in such circumstances can scarcely be advanced as a proof that the proceedings were fraudulent. It may be that the alleged contemnors have made themselves liable to proceedings at the instance of Wright; that is a question on which their Lordships express no opinion whatever, and have no adequate means of forming one; it may be that the conduct of the appellant may turn out to be open to strong animadversion from other points of view than that of contempt of Court, but for the purposes of the present proceeding it has not been proved, and cannot be assumed, that the proceedings before the magistrate were tainted by any fraud on the part of the appellant.

The question is therefore narrowed down to the bare ground stated in the summons, namely, whether under the circumstances procurement of the warrant and the arrest consequent thereon constituted in law a contempt of the Supreme Court. Their Lordships think they did not. Where a plaintiff who has been refused a warrant for the detention of the defendant by a civil Court straightway starts a criminal process on the same subject-matter, and, by means of allegations to which the civil Court attached no credit, obtains his warrant from a different Court, almost as a matter of course he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the civil Court, whatever may be its other consequences.

The next order complained of, that of May 7, 1909, arose out of the case of *Rex* v. *Ganson and Others* in the Supreme Court, in which the appellant was retained to defend three of the accused. He was desirous of securing the attendance of two witnesses, Ashley and Gittens, who were prison warders, and applied to the Master of the Supreme Court for subpœnas for them. The subpœnas were accordingly issued on the deposit by the appellant of the conduct money, or allowance usual for witnesses of that class (there being no fees payable), and were duly served by the bailiff. It turned out that the witnesses named said they knew nothing about the case, so the appellant asked them to return the subpœnas to him, which they did. He then struck out the names of Ashley and Gittens, and substituted for them the names of two labourers, Lamina and Sorie. The subpœnas, so altered, were served by the appellant on Lamina and Sorie, and one of them, Lamina, was called and gave evidence. On these facts being disclosed at the trial the learned Chief Justice ordered Lamina's subpœna to be impounded.

Proceedings were subsequently taken against the appellant in the police court at Freetown on the charge that he had forged the subpœnas delivered to Lamina and Sorie.

The facts above stated, which were never in dispute, and which constituted the whole case against the appellant on this head, were then duly proved, with one additional circumstance worthy

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1912

TAYLOR, IN THE MATTER OF.

of note. It appeared on cross-examination of the Deputy Master and Registrar of the Supreme Court, who is also under-sheriff, that the appellant called on him on February 27, 1909, for a subpœna for one Anderson. At that time the other subpœnas, including those for Ashley and Gittens, had been issued, and the Deputy Master admitted that the appellant told him that he wanted some other witnesses substituted. He clearly referred to a proposed substitution of names in the existing subpœnas. The Deputy Master never told him that new subpœnas would have to be taken out. He made no protest or objection. It did not seem to strike him as being in any way a serious matter, though, possibly enough, if any one had paused to think about it, it would have been recognized as an irregularity.

The appellant was committed for trial, and on May 1, 1909, the Attorney-General preferred an information against the appellant charging him with (1.) altering two copies of a subpœna with intent to defraud, (2.) serving the copies, so altered, with intent to defraud, and (3.) uttering forged subpœnas, with intent to defraud, knowing that they were forged.

The case came on for trial before the Chief Justice on May 3 and 7, 1909. Some of appellant's colleagues at the Bar made a representation to his Honour, pointing out that the effect of his pleading to the information would be a conviction for an indictable offence, the consequence of which would be the removal of his name from the roll of the Inns of Court in London. His Honour, therefore, on the application of the appellant's counsel, consented that a plea should not be taken, the prisoner admitting his guilt and submitting to a fine of 20*l.*, which was paid.

Their Lordships are of opinion that the facts alleged against the appellant did not suffice to establish the very serious offence with which he was charged. The evidence does not shew or suggest any intent to defraud on the part of the appellant, and, indeed, there seems to have been no motive so far as he was concerned which could give rise to any such intent. At the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

A fresh proceeding was then immediately instituted against

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1912
TAYLOR, IN THE MATTER OF.

the appellant to have him struck off the roll of barristers and solicitors of the Supreme Court of the Colony, and on May 10, 1909, the Chief Justice made an order to that effect. This is the third order complained of. It is founded entirely on the two alleged offences already dealt with, and must stand or fall with them. It is true that the Chief Justice in giving his reasons for this order refers to the appellant's "conduct in other professional matters" as rendering him unfit to be on the rolls of the Court, but no such matters are specified for the information of their Lordships, nor has the appellant been heard upon them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the order of September 3, 1908, should be discharged, and the sum of 100*l.* and the costs paid thereunder by the appellant be returned to him; that the order of May 7, 1909, be discharged, except in so far as the same accepts the offer of the appellant to pay the sum of 20*l.*; and that the order of May 10, 1909, be discharged, and the name of the appellant restored to the roll of the Supreme Court of the Colony of Sierra Leone.

No order is made as to the costs of this appeal.

Solicitor for appellant: *T. D. Metcalfe.*
Solicitors for respondents: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

J. C.*
1911
Dec. 14, 15, 18, 20.
1912
Feb. 21.

WINNIPEG ELECTRIC RAILWAY COMPANY . DEFENDANTS;

AND

CITY OF WINNIPEG . . . . PLAINTIFFS.

AND CROSS-APPEAL.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

Statutory and Delegated Powers of Appellant Corporation—Construction—Restriction upon importing Electric Energy within the Municipal Limits not expressed, could not be implied—Pole and Wire System not unauthorized—Construction of By-law.

In a suit by the respondent city corporation against the appellants, who were the successors by amalgamation or purchase of four electric companies, all of whose powers and privileges admittedly vested in them, in effect to restrain them from importing into the city electrical energy produced outside its limits, and for the removal of poles and wires erected and used by them within those limits for the transmission thereof:—

Held, (1.) that as the various Acts and agreements under which the companies were constituted did not expressly forbid or restrict the importation complained of or the erection of poles and wires to transmit the imported energy, such prohibition or restriction could not be implied; (2.) that a restriction contained in a by-law scheduled to the incorporating Act of one of the four companies to the effect that such power houses as were required should be kept within the city and be liable to city taxation had been duly observed, did not cut down the wider powers vested in the other companies and therefore in the appellants, and could not on its true construction be extended so as to prohibit the importation of power or to compel its manufacture within the municipal limits.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Manitoba (December 23, 1910) varying an order of the Court of King's Bench (January 27, 1910).

The city of Winnipeg sued on November 12, 1906, for a declaration that the defendants, a municipal corporation whose powers and obligations are defined in Manitoba Act 1 & 2 Edw. 7, c. 77, and amending statutes, and the history of whose formation

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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is narrated in their Lordships' judgment, have no right to erect poles or wires in the city in order to transmit electrical power developed outside the city limits, with consequent relief. This first portion of the suit was the subject of the defendants' appeal, while the cross-appeal of the city related to the further prayer of the plaint, which was for a declaration that the defendants have no right to make use of any electric power for the operation of their street railway system except such as is developed within the limits of the city ; and a further declaration that the defendants had failed to fulfil the terms and conditions of a city by-law No. 543, the material paragraph of which is set out in their Lordships' judgment, and that the enjoyment of any privileges conferred thereby should cease till such fulfilment.

Mathers J. decreed as prayed in the first portion of the suit. As regards the second portion he held that the defendants' works and machinery at Lac du Bonnet, a place sixty-four miles from the city, were a power house, engines, and machinery within the meaning of the by-law, and that their use might constitute a breach of contract for which the city might recover damages. But he held that any right of the city to prevent the continued operation of the street railway by their means had been lost by waiver.

The Court of Appeal held in effect that the defendants had no right to use the streets, without the assent of the city, for transmission of electrical energy wherever produced, except for the one purpose of operating their street railway. Upon the second portion of the suit a majority (Howell C.J. and Perdue J.A.) decided that the works and machinery at Lac du Bonnet were not a power house within the meaning of the by-law. Richard J.A., on the other hand, held that it was, and that its use constituted a breach of the by-law, and that the right of the defendants to the enjoyment of their privileges had ceased and would continue suspended until they fulfilled the conditions laid down therein.

Danckwerts, K.C., Nesbitt, K.C., Munson, K.C., D. H. Laird, and *G. Lawrence,* for the appellants, the Winnipeg Electric Railway Company, contended that there was nothing in any statute or contract under which they derive their powers to prevent them bringing into the city of Winnipeg electric power which is produced outside the city limits. Their doing so had been acquiesced in by the city, and no prohibition or restriction could be raised by implication. Their pole and wire system had covered almost the entire city, involving large expenditure and supplying electric light to thousands of customers as well as power to a less number. The evidence shewed that the poles had been erected to the knowledge of the city and after written permits by its officers had been issued, and that the respondents had used them for their own purposes by agreements with the appellants. It was contended that the city was bound by acquiescence and could not now set up that it was not authorized by their by-law. The appellants had vested in them all the powers which had been obtained by their predecessors the Manitoba Company, the North-West Company, the Street Railway Company, and the Power Company. They relied on Manitoba Act 43 Vict. c. 36, ss. 23 and 29, and on agreements made between the Manitoba Company and the respondents on July 15 and November 6, 1889, and upon numerous permits duly issued thereunder by the city engineer; and on an agreement made August 23, 1889, between the North-West Electric Company and the respondents. In all cases where the poles were lawfully erected by statutory or contractual authority they could be used for all lawful purposes in the absence of express restriction and having regard to long acquiescence. They also relied on the provincial Act 55 Vict. c. 56, ss. 10 and 12, the incorporating Act of the Street Railway Company, and the respondents' consent by by-law obtained thereunder. They were also entitled without obtaining any consent under 3 & 4 Edw. 7, c. 87, s. 4, which also related to the street railway; and also under 1 & 2 Edw. 7, c. 75, ss. 7, 9, 18, the incorporating Act of the Power Company, and the respondents' consent obtained thereunder. The appellants had incurred heavy expenditure and made large outlays of capital on the faith of these Acts, contracts, consents, and permits, and it was contended that the provision contained in the Winnipeg Charter, 1 & 2 Edw. 7, c. 77, s. 472, and in the general

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Municipal Act of the Province of Manitoba of 1890, that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," was not applicable and did not have the effect of rendering the permits and other consents given revocable at pleasure by the city. Those Acts were later in date than the Act which incorporated the Manitoba Company. The respondents by their conduct and the Manitoba Legislature by various Acts from 1899 onwards had recognized the existence of the electric lighting works of the Street Railway Company, thus including, it was submitted, the pole and wire system of the appellants and its use and operation in the manner impugned for the first time by this suit.

With regard to the cross-appeal the broad question there raised was whether the Winnipeg Electric Railway Company in respect of its water power plant outside the limits of the city had been guilty of a breach of by-law No. 543, which obliged them to keep all their power houses within the city, and thereby forfeited their privileges under that by-law until the breach is remedied. That clause, it was contended, did not bar the respondents' use of power not developed within the city. It only barred them from placing their own power houses outside the limits, not from purchasing and importing power from another concern operating outside those limits. It impliedly recognized their right to purchase and import in the manner complained of. The Street Railway Company were not affected by the by-law, and the appellants as their successors are not affected by it. Further the expression "power houses" in the by-law did not include a plant for the development of water power, which must necessarily be placed where the water is. The remedy of the city if they established the appellants' default was in damages and not as claimed. Reference was made to *Hull Electric Co.* v. *Ottawa Electric Co.* (1); *Goldsmid* v. *Great Eastern Ry. Co.* (2); *Plimmer* v. *Mayor, &c. of Wellington* (3); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (4); *Perth Gas Co.* v. *City of Perth Corporation* (5); *Montreal* v. *Standard Light and Power Co.* (6)

(1) [1902] A. C. 237.
(2) (1883) 25 Ch. D. 511.
(3) (1884) 9 App. Cas. 699.
(4) [1905] A. C. 52.
(5) [1911] A. C. 506, 519.
(6) [1897] A. C. 527.

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Sir R. Finlay, K.C., Ewart, K.C., Rowlatt, and *Theo. A. Hunt,* for the city of Winnipeg in both appeals, contended that the appellants had no authority to sell and distribute electricity for lighting and power purposes within the city; while the respondents by s. 719 of their city charter were vested with the possession of all the highways in the city and were made liable for the repair thereof. It was contended in the first appeal that the Court of Appeal was right in holding that the appellants had not acquired a right to erect their pole and wire system within the city for the transmission of electric energy other than for their street railway. Act 43 Vict. c. 36 did not empower them to do so. Under the three agreements relied upon, dated July 15, August 23, and November 6, 1889, whatever permission was given to them to do so was subject to the supervision of the city engineer. The incorporating Act of the Street Railway Company (55 Vict. c. 56) sanctioned the operation of their railway in the city streets by such motive power as might be authorized by the city and the exercise of all powers set forth in a city by-law No. 543 scheduled to and validated by their Act. That by-law dealt only with the construction and working of an electric street railway and had no reference to light, heat, or power. It contained a restriction as to the limits of the appellants' operations which must be held applicable to all their powers. No by-law was passed authorizing the pole and wire system of the appellants. It was contended that the appellants never received under any of the Acts or agreements referred to authority to use the city streets according to their own pleasure. Sect. 29 of 43 Vict. c. 36 did not authorize the erection of poles, and by the agreement of July 15, 1889, they were not to erect them without the consent of the city. Their rights, except so far as their street railway purposes were concerned, were always subject to the consent of the city previously had and obtained, to be given either by by-law under the Street Railway Company's Act or by agreement or Order in Council under the Power Company's Act. The evidence shewed that no by-law or other formal consent of any kind was ever given by the city to the use of the streets for the purposes now in question. No request for such consent was ever made, and there has been no appeal as provided

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in one of the Acts to the Lieutenant-Governor in Council. Nor has the city waived its right to object because of the permits from time to time given. No permission of any kind was ever given to the appellants to erect poles. Even if the permission given to the Electric and Gas Light Company is taken to be given to the appellants it was ineffective because not given by by-law. As to the respondents not objecting to the importation by the appellants of electric energy into the city which had been produced outside, there was evidence that they were warned in good time both orally and by letter that the permission of the city was necessary before they could legally do so. It was contended that no waiver was proved in fact, and the city being a public corporation could not waive a protection given to its citizens by statute and could not be estopped from objecting to operations to which it had not validly assented.

In the cross-appeal it was contended that the appellants were bound by the terms of the by-law No. 543 to keep all their power houses within the city limits. But the power house at Lac du Bonnet and the machinery there are a power house and machinery within the meaning of paragraph 11 of that by-law. Its construction was begun by the General Power Company and completed by the appellants, who erected a transmission line therefrom across the intervening municipalities and across the Red River, which forms the eastern boundary of the city, to a sub-station within the city. The respondents never consented to the wires crossing the river, but the appellants continued to transmit energy from Lac du Bonnet power house to their sub-station and thence generated the direct current with which they operated their street railway system in the city. Thus the power house at the lake was where the electrical energy was generated, and the only office performed by the machinery within the city was to transmit energy generated elsewhere into a new form. It was contended that the appellants' continued right to use the streets is by the by-law stipulated to depend upon the appellants' continued observance of its terms. There was no power to waive the non-observance, for to do so would be to dispense with a provision of a by-law which had been declared to have the same effect as if enacted by the

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Legislature; and there was no evidence of such waiver having been made.

Danckwerts, K.C., in reply.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The appellants are the successors, by amalgamation, purchase, or agreement, of certain companies hereinafter referred to, the general object of whose constitution was for the supply of light, heat, and power in and about the city of Winnipeg by gas or by electricity. This is stating the position of the appellants in the most general terms. It was not denied by the counsel for the respondents that the powers, rights, privileges, and franchises belonging to the respective companies who were predecessors of the appellants have been taken up and carried forward by reason of the various transactions of amalgamation and otherwise, and are now vested in the appellants. As, however, a most minute criticism has been made of the powers which are now sought to be exercised by the appellants, it is necessary to state in detail what these were, and what were the various steps by which the present situation has been reached.

In the year 1880 the Manitoba Electric and Gas Light Company was incorporated by an Act of the Legislature of Manitoba (43 Vict. c. 36), and by s. 23 of the statute the company was empowered to supply light and heat in Manitoba by gas, electricity, or other means. While the area of the operations of the company was not limited to the city of Winnipeg, the authority, as is seen, did not extend to the supply of power. By various sections of the statute the company was given large powers for the acquisition of property for their purposes, and for the construction, erection, and use of their works, and also "to alienate any of their personal property, lands, tenements, rights, and franchises, or any interest therein, as they should see fit." Authority was given to "break up, dig, and trench so much and so many of the public streets, roads, squares, highways, and other public places in any municipality or other portion of the province as may at any time be necessary or required for laying down or erecting the mains, pipes, or wires, to conduct the gas or electricity from the works of the said company to the customers thereof," or for taking up, altering, or repairing the same.

To save coming back upon it, there are two observations which may be made upon this, which is the first of these incorporating statutes. In the first place, their Lordships do not feel disposed to assent to the proposition that power to do certain things "for laying down or erecting the mains, pipes, or wires" is to be read as a power which did not extend to the putting up of poles upon which the wires could hang, and they are not surprised to learn that during the thirty years which have elapsed since the passing of the Act such a point was never taken. Language of this kind must be reasonably construed: and a perusal of other sections of the statute, and of other expressions occurring in the course of the Act, shews quite clearly that the accompaniment of poles for the wiring is simply what is implied in any reasonable reading of the powers to be exercised by the company.

In the second place, the 23rd, 25th, and 29th sections of this Act of 1880 appear by their provisions to present a most reasonable view of the natural relations which exist on the one hand between a municipality whose streets are used in the course of the operations for the supply of gas and electrical power and, on the other, of the company furnishing the supply. Under the 25th section it is provided that the company shall so construct and locate their works and all apparatus connected therewith as not to endanger the public health, convenience, or safety, the whole works, &c., to be open to visit and inspection by the municipality at all reasonable times, and the company being bound to obey "all just and reasonable orders and directions they shall receive." Sect. 29 also makes fairly clear what are the rights and duties of company and municipality respectively, by providing that, when streets are broken up, wires erected, and so forth, the company is to do no unnecessary damage, and take care, as far as may be, to preserve free passage through the said streets, and make such openings as the municipality or the Governor in Council, as the case may be, shall permit and point out, and place such guards, lamps, &c.,

and taking such precautions as may be necessary for the prevention of accidents. There follow provisions for the finishing and replacing the work and restoration of the streets. It is provided further that, for the purpose of laying mains, it shall not be lawful for the company, except with the written consent of the engineer of the municipality, to break up or interfere with the streets until after thirty days' notice in writing, but for the purpose of laying or erecting service pipes or wires, or for repairing such, this may be done without any notice.

These provisions have been referred to because, as already indicated, they point to such a regulation and accommodation of the private interests of the company with the public interests of the inhabitants as seems, if reasonably acted upon, adequate to protect both, and to prevent frictions or collision. The language of these provisions not unnaturally reappears in the agreements between the city and the companies after referred to.

In this year 1889, if there ever could have been any question as to whether the right to put up poles was included in the Manitoba Electric and Gas Company's power, that question was set at rest. Reference was frequently made to an agreement of date July 15, 1889, between the city of Winnipeg and the Manitoba Electric and Gas Light Company. It was thereby agreed that the city should grant its permits for poles under certain conditions. One of these was that the company should give to the city the right to use free of charge such poles as the council might require for light and power, and for the stringing of wires for the fire alarm system, &c. Notice is taken by this time of the Electric Light and Power Company of Winnipeg, of which nothing further is heard, and of the North-West Electric Company, incorporated a month before, and to be hereinafter referred to, and it is provided that the Manitoba Electric and Gas Company shall give to these other companies "the right to string wires upon their poles for the purpose of light (arc, incandescent, or otherwise) and power distribution, upon payment by them of a fair annual rental." So far as the city is concerned it thus appears to be clear (1.) that the limitation of the Manitoba Company to light and heat was not acted upon, but on the contrary, (2.) provision was made for communication of power to the city over the company's poles, and (3.) the use of these for power distribution by the newly-formed company was specially provided for.

Provisions are made for the issue of permits and for forfeiture in the case of the violation of any of the conditions. No suggestion of forfeiture in consequence of any such violation was made in this case. Thousands of permits have been issued, the whole of which, the Board was informed, were, with the exception of one, in the name of the Manitoba Gas Company. It should be further explained that it was provided by the agreement that "wherever in this agreement the company is named or referred to it should be taken to mean and include, as well as the said company, its successors and assigns, as fully and to all intents and purposes as if its successors and assigns were in each case specially mentioned."

In November of the same year 1889 another agreement was entered into between the city and the Manitoba Electric and Gas Light Company, under which arrangements were made, in consideration of the issue of permits to erect poles, for the furnishing of maps, and for other practical directions and requirements being made, and in particular for the company leaving space for and providing "a top arm on each of their poles for the line of wires for civic purposes." It is thus quite clear that by this time the system of the electric supply, in its widest sense, under which the requirements and conveniences of the city, as well as of the customers of the company, were all provided for, was in full operation.

In June of this year 1889 the North-West Electric Company, Limited, was incorporated by letters patent under the Manitoba Joint Stock Companies Act, "for the purpose and with the object of acquiring, building, constructing, erecting, operating, and maintaining an electric lighting system or systems, electric street railways, electric motors, or other electrical power . . . . in the various cities, towns, and villages, in the Province of Manitoba." The objects of the new company were not limited to light and heat, but they include, in short, everything within the widest range of an electric company's business. An amalgamation of this concern with the Manitoba Electric and Gas Light

Company was possibly, and, it may be, manifestly, in contemplation. On August 23 the city agreed with the North-West Electric Company (then two months old) to give permits for the erection of poles on similar conditions to those granted to the Manitoba Electric and Gas Light Company in the previous month, namely, on July 15. It was provided that the new company should give to the old, just as a month before it had been provided that the old company should give to the new, the right to string wires upon their poles upon payment of a fair annual rental. In all this the city actively co-operated.

In 1892 a third company, called the Winnipeg Electric Street Railway Company, was incorporated. This was done by an Act of the Legislature of Manitoba (55 Vict. c. 56). Authority was given to construct and operate a railway on the streets of the city and adjacent municipalities and to exercise all powers set forth in a by-law scheduled to the Act. The company was also authorized to carry on the business of selling, licensing, and disposing of electric light, heat, or power, and was to have the right to erect all necessary "poles, wires, conduits, and appliances." The provisions of the by-law, which contains a reference to the keeping of machinery and power houses within the city, will be afterwards referred to. This company came into operation and erected and used poles for wires placed in the streets.

On January 4, 1898, this Street Railway Company acquired by conveyance from the Manitoba Company all the assets of the latter, including "all franchises, rights, powers, &c." On June 9, 1900, the Street Railway Company absorbed the second company, namely, the North-West Company, taking over by purchase all its assets, including "all franchises, rights, powers, &c." None of these consolidations took place without the knowledge of the municipality of the city of Winnipeg. On the contrary the city continued its co-operation, participating in the use of the plant and receiving supplies just as before.

In 1902 a fourth company, called the Winnipeg General Power Company, was incorporated by Act of the Legislature of Manitoba (1 & 2 Edw. 7, c. 75). It was given the fullest powers of carrying on the business of electricity "for the purpose of light,

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heat, or motive power, and any other purpose for which the same may be used," and to acquire, make, or operate "all necessary works in Manitoba for the purpose aforesaid and for the utilisation, transmission, and supply of electricity, or water power, including poles, wires, pipes, conduits, and appliances of every kind necessary or advisable therefor, and which may, with the consent of the council of any municipality affected, be erected in or along any streets or highways in the Province of Manitoba, subject to the provisions hereinafter contained." By s. 9 it was provided that, in the event of the company and any municipality failing to agree as to the terms of the exercise of the franchise or rights, there should be an appeal to the Lieutenant-Governor of Manitoba, and by s. 18 it was provided that the company might enter into an agreement with any other company for amalgamation, and the amalgamated company should have "all the rights of exercising the powers, privileges, and franchises of the companies entering into such agreement or a party to such sale or purchase."

The position of the General Power Company, accordingly, was this. It had unlimited powers with regard to the electrical business. In the event of a municipality failing to agree to such details as the erection of poles for wires, there was an appeal to the Lieutenant-Governor, and it was specially provided that any amalgamation of the company with existing companies should give the amalgamation the powers of the companies absorbed. This must, of course, be read as in addition to, and not in derogation of, the powers conferred upon itself.

The Street Railway Company had not yet joined the combination. But in the year 1904 the Street Railway Company and the Power Company amalgamated by agreement, and the amalgamation was ratified by the Legislature in 4 & 5 Edw. 7, c. 72, and 9 Edw. 7, c. 108, of the statutes of Manitoba. The validity of any of the amalgamations referred to has in no further particular been questioned in the present case.

The amalgamated company was named the Winnipeg Electric Railway Company, and they are the appellants herein. They, in point of fact, are accordingly the successors by amalgamation of the Electric Street Railway Company and the Winnipeg General

Power Company, and the successors by purchase of the Manitoba Electric and Gas Light Company and the North-West Electric Company. The details of all these transactions need not be further entered upon, but the result is as stated.

It may now be mentioned that the Power Company (incorporated in 1902) had, prior to the agreement of amalgamation, commenced the erection of large and important works at Lac du Bonnet, some sixty or seventy miles from the city of Winnipeg, for the purpose of generating electricity by water power. These operations were important and involved large expenditure, and it is manifest that the transmission of power to communities like the city of Winnipeg,—power supplied by nature and converted and conveyed by suitable apparatus,—was not unlikely to be put to the best use of, and at the least cost to, the consumer, if it could be linked up with the system or systems in operation within the municipality so as to reduce to a minimum all interference with the streets or highways, and to take advantage of existing and available plant.

After an analysis of the statutes, agreements, &c., under which the companies ultimately amalgamating were constituted, their Lordships are unable to discover anything forbidding or restricting the importation into the city of Winnipeg of power from outside its bounds. Such a restriction, which might seriously hamper the operations of the company in conveying, for the use of consumers within the city, power which could be obtained from outside on easier terms than by manufacture inside, might be to the disadvantage of all parties,—producers and consumers,—and such a prohibition or limitation accordingly would not be readily implied. In their Lordships' opinion, neither by implication nor expression is there a prohibition or limitation of such a kind in this case. In the arguments presented for the city of Winnipeg the argument upon this head was confined to the point of a restriction as to the construction, &c., of "power houses" within the city, the restriction being applicable to the case of the Street Railway Company as now to be mentioned.

The argument is that, although this restriction occurs in the case of the Street Railway Company alone, it must be read into a restriction of all the powers of all the other companies of which the amalgamation was composed, and that the wider and unlimited powers of the other companies amalgamated are restricted by the clause as to the street railway. This contention is somewhat singular, and does not appear to their Lordships to be justified by the language of the statutes, agreements, or other documents founded on. This might be sufficient for determination of the point. But in view of the arguments submitted it may be right to quote the exact terms of the restriction itself in the case of the Street Railway Company. It occurs in the by-law of the city of Winnipeg, which is confirmed by the Act to incorporate the Winnipeg Electric Street Railway Company (55 Vict. c. 56), assented to on April 20, 1892. Sect. 11 of the by-law is as follows: "The railway property of all kinds, including cars, equipment, power house, engines, dynamos, and appliances of all kinds relating to the railway . . . . shall be liable to taxation . . . . The company shall place and keep within the city limits all their engines, machinery, power houses, repair shops, and construction shops (if any)." It may be observed that this section is primarily a section dealing with taxation. Neither it nor any part of the by-law or the Act of the Legislature prohibits the company from purchasing power or entering into a transaction of that kind which might prove highly advantageous and economical. Nor, in the second place, with regard to "power houses," upon which the argument has dwelt, does it oblige the company to erect such power houses, but what the clause does do is to say that, if these are required, they shall be kept within the city limits and be liable to the city taxation. In the opinion of their Lordships, it is not legitimate to convert a section of this character into a restriction upon the Winnipeg Electric Street Railway Company of the importation of power, or a compulsitor upon that company to be its own manufacturer of power within the city bounds. Such a restriction might prove, and the figures laid before the Board and admitted by both sides seem to shew that that was the case here, highly detrimental to the interests both of the company and the community.

On this part of the case, however, there remains a further point with which, in view of the arguments so anxiously submitted to the Board, it is, in the opinion of their Lordships, expedient to deal. The point is this: apart altogether from the general argument against prohibition which has been tabled, how do the facts stand as to the "houses," apparatus, &c., for the conversion of power imported into the city; and do not these reasonably and adequately satisfy the provision as to "power houses" under the Act? Their Lordships venture to refer to the lucid narrative in the judgment of Mathers J. upon this subject:

"Prior to amalgamation the Power Company had commenced the construction of a hydro-electric power plant at Lac du Bonnet on the Winnipeg River, about sixty-four miles from Winnipeg, and had expended a large sum of money upon the same. After amalgamation the amalgamated company completed, at an additional expense of several millions of dollars, this work, including the erection of a transmission line, which crossed the Red River into the city of Winnipeg to a power house or sub-station (hereinafter referred to as the Mill Street sub-station) erected by the defendant company on property it then owned abutting on the Red River.

"In this sub-station there is transforming apparatus for the purpose of reducing the voltage of the current brought over the transmission line, and also a generating plant for the purpose of generating direct current. The direct current generators are operated by a motor driven by the alternating current brought over the transmission line, and the direct current so generated is sent out of the Mill Street sub-station and is used for the purpose of propelling the street cars through the city of Winnipeg. . . .

"In June, 1906, the defendants' hydro-electric plant at Lac du Bonnet was completed, and on the 13th June the defendants began to send current over the transmission wires to their Mill Street sub-station. It comes over the transmission wires at a voltage of about 55,000 volts, and so enters the sub-station. It then passes through a transformer, which steps it down to about 2200 volts. Part of this reduced current is used to drive direct current generators which supply the current for the defendants' street railway system, and part of it is used for the purpose of their electric lighting system throughout the city, and for commercial power. It leaves the sub-station at 2200 volts, but at

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different points through the city it passes through further transformers which reduce it to 110 to 120 volts, which reduced current passes over secondary wires into the various buildings where light is used."

In these circumstances, their Lordships are disposed to think that the language of the by-law as to the company keeping within the city limits their engines, machinery, power houses, &c., is amply satisfied by what has actually been done by the appellant company. Unless, in short, the language of this by-law excludes the importation of power, it appears to be the case in fact that its language, as well as its spirit, have been complied with within the city limits.

Failing the case upon the power house, the city of Winnipeg, however, has presented another point, which is this: Assuming that there is no restriction upon the importation of power from outside, still that power has to be linked up with the machinery for conversion, reduction of voltage, and transmission within the city, and for this purpose of connection six poles were required, and for the erection of these poles no authority was given. Whatever view may be entertained as to the taking of such a point, it turns out not to be in accord with the facts. The letters have been produced in the case, and the narrative given by Mathers J. on the subject has not been controverted:

"In order that the current brought from Lac du Bonnet might be utilized for the purpose of operating the defendants' street car lines and their electric lighting and power systems it was necessary to erect six additional poles, three along the Thistle Street Lane from Victoria Street eastward, and three along Mill Street from Thistle Street Lane to the then existing line of the defendants.

"On 17th August, 1905, Mr. Phillips, the defendants' manager, wrote to H. N. Ruttan, the city engineer, the following letter:—'Dear Sir,—Kindly grant permit to extend pole line on south side of Thistle Street Lane from end of present line east on Victoria Street, three poles east, and also on Mill Street, east side, from end of present line south to Thistle Lane, three poles.'

"That letter, as well as the other letters in which application for permits were made, was headed, 'Winnipeg Electric Railway Company,' and underneath, 'operating Winnipeg Street Railway; Manitoba Electric and Gas Light Company; North-West Electric Company; and Winnipeg General Power Company.' In the ordinary way this request for permit was referred to the city electrician. His duty was to ascertain whether or not the portion of the street intended to be occupied by the proposed poles was required for any city poles, and on the electrician replying that the erection of these poles would not interfere with the city, a permit No. 3545 was issued by S. H. Reynolds, the assistant city engineer, pursuant to a general practice that had prevailed in the office, in the following terms: 'Manitoba Electric and Gas Light Company is hereby permitted to erect poles. (Here follows a description of several locations where poles may be erected, having no reference to this action, and continues)—Also to extend poles line on south side of Thistle Street Lane from end of present line east of Victoria Street three poles east; also on Mill Street, east side from end of present line south to Thistle Lane, three poles, under the requirements of the city byelaws and the regulations of the Committee on Works and any special agreements relating to this matter.'"

It thus appears to be undoubted that, so far as permits were concerned, these were obtained from the city authorities. In this situation, what is the attitude which the respondents have assumed? They have challenged their own permits—not only these six permits, but the thousands of others—as having been granted without a by-law. Their Lordships do not enter upon the topic at length because, in their opinion, the granting of permits did not require a by-law in each case, but was an executive act to carry out a general by-law such as is admitted to have been quite properly passed. Otherwise business could not be carried on, and at any moment the authorities or an official of the city could bring the entire operations, which have involved great capital expenditure, to a deadlock, bringing upon all parties sudden and great inconvenience and loss.

Furthermore, their Lordships do not leave out of view the fact that, after the amalgamation of the appellant company was

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completed, and after the large expenditure for the transmission of power to the Red River and the bridging of that river to the city had been incurred, and with full knowledge on the part of everybody of the meaning and effect of these great operations "The city recognized the continued existence of its contract with them by passing byelaws on the 11th February, 1907, and on the 4th March, 1907, fixing a schedule pursuant to which the defendants must operate their cars . . . . It also, on 24th June, 1907, under the powers contained in byelaw 543, passed a resolution requiring notice to the railway company to proceed at once with the construction and operation of double street railway lines on ten different streets or parts of streets in the city, and directed the work to commence on these lines not later than the 1st of July, 1907."

This is the language of Mathers J., and the accuracy of his narrative was not denied, nor of what succeeds: "The defendant company proceeded as required with the construction of these lines, and having expended a large sum of money in doing so, and in subsequently operating them. It is true that the resolution is directed to the Winnipeg Electric Street Railway Company, and not to the defendant company. It does not seem to me that that makes any difference, because the plaintiff knew of the amalgamation of that company with the Power Company, and that at that time the power by which the street railway was being operated was that derived from Lac du Bonnet. Byelaw 543 provides that five per cent. of the gross earnings of the street railway shall be paid annually to the plaintiff. These sums, aggregating about $100,000, have been paid by the defendant company to the plaintiff since it has begun to use the Lac du Bonnet power, and this money has been accepted by the plaintiff."

In their Lordships' opinion, the facts of this case give ample warrant for the conclusion which Mathers J. reaches, in which conclusion their Lordships concur, that "after these unequivocal acts recognizing the continued existence of the contract, entailing a large expenditure by the defendants, the city is too late now to have it declared that the defendants have forfeited their privileges in the streets."

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Were it open to the city authorities to go back upon the permits issued by themselves and their predecessors, and to obtain a declaration that these have all along been invalid, serious and far-reaching consequences might ensue,—the traffic of the city might be dislocated or stopped and the municipal services provided from the supply would cease and the city itself plunged in darkness. Their Lordships think it right to add their opinion, however, that, important as the questions of the history and acting of parties are, the rights and interests both of the city and the appellants are, upon the statutes and documents themselves, not on a basis so precarious and insecure.

The question that arises after the facts are thus reviewed is: What was it that the city of Winnipeg in those circumstances really desired? The case, notwithstanding all its length and complexity, has never gone beyond the initial demand suddenly made by the city solicitor of Winnipeg in his letter of May 3, 1906: "I beg to notify you that, unless you are prepared to treat with the city as to the terms upon which power shall be brought in, an application will be made restraining you from exercising such privilege within the city limits until such time as you have made application to the city, and an agreement is reached."

Throughout all the length of the case the same objection, for apparently the same reason, is made—the objection that the appellants have no right to import power into the city, that the city can forbid this, and that its consent must be obtained at a price. In their Lordships' opinion, for the reasons already stated that contention is not well founded in law.

It is here proper to state that, as the result of the argument before their Lordships' Board, the demands of the respondents were conveniently placed before their Lordships by their learned counsel, and an order or decree is now asked under the following four heads:—

"1. That it may be declared that the defendants have not the right to use the three poles on the south side of Thistle Street Lane and the three poles on the east side of Mill Street mentioned in the permit No. 3545, dated 8th September 1905, for the transmission of electric energy for the purpose of working the street railway which has been produced outside the city limits, or has

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been produced by means of electric energy or other power produced outside the city limits.

"2. That it may be declared that the works of the defendants situate at Lac du Bonnet and the machinery there installed constitute a power house, engines, and machinery within the meaning of clause 11 of byelaw No. 543 of the city of Winnipeg referred to in the pleadings herein, and that the defendants have failed in this respect to fulfil the conditions mentioned in the said byelaw, and that their enjoyment of the privileges conferred by the said byelaw should cease until the defendants comply with the said conditions as contained in the said clause 11 of the byelaw.

"3. That it may be declared that the defendants have no right without the consent of the City Council to erect poles or wires in the streets, lanes, or highways of the city of Winnipeg for the purpose of transmitting electric power developed outside the city limits.

"4. That the defendants may be restrained from using without the consent of the city any poles and wires erected by them, for the purpose of transmitting electric power developed outside the city limits, and from erecting any poles or wires to be used for such purpose without the like consent."

It is not necessary to enter upon the question of whether the language of these orders squares with that employed in the suit—probably at least it is not inconsistent with it. Their Lordships are of opinion that the orders thus sought are beyond the rights of the respondents.

With regard to the first conclusion, in their Lordships' opinion, the defendants have the right to use the poles mentioned for the transmission of energy for the purpose of working the street railway.

As to the second conclusion, that it may be declared that the Lac du Bonnet works and machinery constitute a power house, &c., within the meaning of clause 11 of the by-law, and that the defendants have failed to fulfil the conditions in the by-law, and that their privileges should cease until they so do, their Lordships are of opinion that this proceeds entirely upon the error already referred to. The power houses for conversion, reduction, and distribution already within the city amply satisfy the provisions

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of the by-law, and there is no occasion for attempting to extend those provisions to power houses, &c., sixty or seventy miles away, or to import into any arrangements between the city and the appellants a prohibition which nowhere expressly appears against importation of power.

As to the third conclusion, that it may be declared that the defendants have no right, without the city's consent, to erect poles or wires for transmitting power developed outside the city limits, their Lordships cannot agree to such a declaration, which is inconsistent with the view already expressed, adverse to the restriction of the importation of power.

As to the fourth conclusion, that the defendants may be restrained from using, without the city's consent, poles or wires for transmitting power developed outside the city limits, that conclusion is clearly negatived for the reasons already given.

It is unnecessary, in the view of their Lordships, to enter upon the question which bulked somewhat largely in the arguments, namely, the position of the city as having itself been a participant in the benefits to be derived from the introduction of power from outside. It appears to be clear that, not only subsequent to the formation of the appellant company, but prior thereto, and during the régime of their predecessors, the city and all the companies concerned co-operated, permits were granted for the erection of poles, orders were issued by the city in regard to location and otherwise, and provision was made for the service of the city as a consumer on specially arranged terms. After the amalgamation elaborate arrangements were made for the erection of a sub-station and for carrying out all arrangements consequent upon the introduction of power from outside, such introduction being mentioned in letters proceeding from the city officials. It is also apparently matter of common knowledge that, while the city was thus impliedly assenting, and indeed actually co-operating, in regard to the scheme, the appellants were, on the other hand, in the course of expending millions of dollars on the completion of the scheme. Whether such action on the part of the city, carried on during a long term and with the knowledge of expenditure as referred to, would bar the rights of the city to such an objection against the introduction of power

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which is at the bottom of all these protracted legal proceedings, need not of course be separately determined, the view of their Lordships on the fundamental rights of parties being as above stated.

Their Lordships are of opinion that both of the judgments of the Court below were erroneous. The learned trial judge, Mathers J., decided substantially in the terms of the orders formulated at the Bar of the Board by the respondents' counsel, that the appellants were not entitled to erect or maintain poles or wires in the streets of the city for the purpose of transmitting electrical energy developed outside. Upon that their Lordships' opinion has been already expressed. On appeal, however, it was held that the appellants had no right to erect or maintain such poles for the transmission of electric energy for any purpose other than their street railway. In other words, as the respondents' case puts it, the Court held that the rights of the company to use the streets without the assent of the city for the transmission of electrical energy, wherever produced, are confined to one purpose, namely, the purpose of operating its street railway. This decision, their Lordships think, goes far beyond the real point which was at issue between the parties, and the respondents not unnaturally expressed themselves willing to accept the view of Mathers J. But in both cases, for the reasons given, their Lordships think that the suit under all its heads falls to be dismissed, and they will humbly advise His Majesty accordingly that the appeal of the Winnipeg Electric Railway Company should be allowed and the cross-appeal by the city of Winnipeg be refused. The city will bear the costs of the proceedings at this Board and full costs in the Courts below.

Solicitors for the Electric Railway Company: *Blake & Redden.*

Solicitors for the city of Winnipeg: *Armitage, Chapple & Macnaghten.*

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[PRIVY COUNCIL.]

NATIONAL TRUST COMPANY, LIMITED . DEFENDANTS;

AND

LOUIS E. WHICHER . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trust Fund for the Redemption of Bonds offered at the Lowest Price—Construction—Lowest Price means Lowest Average Price at which the whole Fund can be applied.

A mortgage deed executed by a company in favour of the appellants as trustees for its bondholders provided for an annual fund out of surplus profits to be devoted by the trustees to the purchase or retirement of its bonds, and directed that from the bonds offered to them the appellant company "shall purchase those bonds which are offered to it at the lowest price":—

Held, that according to the plain intent of this direction "the lowest price" offered meant the price which was lowest on the average as applied to the whole block purchased. There was no breach of contract with the respondent in refusing his offer for a small number of bonds if by its acceptance the average price of the whole block acquired would, having regard to the terms of other offers, have been increased.

APPEAL by special leave from a judgment of the Court of Appeal for Ontario (December 19, 1910) reversing by a majority a judgment of Riddell J. (November 2, 1909).

The appellants were trustees under a mortgage deed executed on June 1, 1905, by the Dominion Copper Company, Limited, for its bondholders, including the respondent, who sued to recover $8200, being the price at which he had offered to the appellants bonds of the par value of $10,000, founding his claim on their breach of trust or breach of contract.

The appellants on May 2, 1907, received from the Dominion Copper Company $170,000 to be applied in the redemption of bonds as provided by article 2 of the mortgage deed set out in their Lordships' judgment. The question raised was whether under the circumstances which were not in dispute the appellants were entitled to reject the respondent's offer and instead of accepting it to redeem bonds which were offered to them by other bondholders at a higher price. It appeared that copper fell heavily in price and the company went into liquidation.

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD ROBSON.

Riddell J. found that the appellants had acted honestly and reasonably and were protected from liability by the Trustee Act, 62 Vict. c. 15, s. 1 (Ontario). He also considered that the deed should be construed in reference to the object in view, which was that the appellants should "redeem as many bonds as possible at the cheapest rate" and reduce as much as possible the bonded indebtedness of the company.

Moss C.J. in appeal thought that the appellants were trustees for individual tenderers of bonds, and that although they acted in good faith they had not complied with the plain directions of the deed and were not protected by the Trustee Act, s. 1. Garrow and Meredith JJ.A. dissented and held that the trust was for the whole body of bondholders and not for the individual tenderer. There were offers above and below the plaintiff's, so that his offer was not at the lowest price. "The lowest price must have meant such offers as would redeem the most bonds for the sum available."

Sir R. Finlay, K.C., *Anglin, K.C.*, *W. Finlay*, and *Cassels*, for the appellants, contended that there was no breach of the directions contained in the mortgage deed. The appellants were trustees for the whole body of bondholders collectively. They were not trustees for any individual tenderer. They acted reasonably and in good faith and were protected from liability both by the Trustee Act, s. 1, and by the provisions of the trust deed: see *National Trustees Co. of Australia* v. *General Finance Co.* (1) There was no liability either in contract or quasi-contract. Reference was made to *Spencer* v. *Harding* (2), and as to contract by advertisement to *Rooke* v. *Dawson* (3); *Carlill* v. *Carbolic Smoke Ball Co.* (4)

Younger, K.C., and *G. Lawrence*, for the respondent, contended that article 2 of the mortgage deed was a provision for the benefit of the bondholders as well as the company. It created a trust for individual bondholders who tendered their bonds for redemption.

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(1) [1905] A. C. 373.
(2) (1870) L. R. 5 C. P. 561.
(3) [1895] 1 Ch. 480.
(4) [1893] 1 Q. B. 256.

The trustees had no option but to redeem those bonds which were tendered to them at the lowest prices, and it was breach of trust to refuse the respondent's tender in favour of those who tendered at a higher price. The advertisement and circular sent out by the appellants to the respondent as well as other bondholders constituted their offer to take the respondent's bonds when tendered on the terms of the mortgage deed, and the respondent's tender was an acceptance of that offer: see *South Hetton Coal Co.* v. *Haswell, &c., Coke and Coal Co.* (1) The case of *Rooke* v. *Dawson* (2) did not apply to this case. There was therefore breach of contract in refusing it as well as breach of trust. Neither the trust deed nor the Trustee Act protected the appellants, who acted in breach of their duty in accepting offers higher than that made by the respondent.

Counsel for the appellants were not heard in reply.

At the close of the arguments their Lordships said they would report to His Majesty that the appeal should be allowed, and subsequently the reasons for that report were delivered by

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Lord Robson. This action was brought by the respondent as a bondholder in the Dominion Copper Company, a corporation constituted under the laws of British Columbia, against the appellants, who are a trust company and were trustees for the bondholders of the Copper Company under a mortgage deed of June 1, 1905. The respondent claimed that the appellants had committed a breach of trust, and further, or alternatively, had committed a breach of contract in refusing to purchase from him certain of his bonds in the Copper Company which he had offered to them for sale in response to an advertisement inviting tenders of bonds under the terms of the mortgage deed.

Shortly stated, the respondent contends that the appellants were bound to expend a certain fund in purchasing bonds at the lowest price, and that his bonds were offered at a price lower than that accepted from the successful tenderer. The appellants, on the other hand, contend that the respondent's offer was for a comparatively small quantity of bonds, and, if accepted, would have put it out of the power of the appellants to purchase the

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(1) [1898] 1 Ch. 465.

(2) [1895] 1 Ch. 480.

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much larger quantity offered by the successful tenderer at a price which admittedly enabled the trustees to expend the whole fund at their disposal so as to procure a larger number of bonds at a lower average price than they could have done if they had accepted the offer of the respondent.

It is admitted that the appellants acted in perfect good faith and in the exercise of an honest judgment as to what appeared to them to be within their powers and in the interest of the bondholders as a whole.

The mortgage deed provided that a fund for the purchase or retirement of bonds should be constituted by means of a stipulated appropriation year by year from the surplus profits of the Copper Company.

By article 2, section 12, it is directed that "The moneys so paid to the trustee shall be applied to the retirement of bonds of the company issued hereunder and secured hereby, and for that purpose only, to be obtained as follows" (omitting immaterial parts):—"The trustee shall . . . . annually or oftener . . . . by a notice published . . . . in a newspaper in general circulation in the cities of New York and Toronto call for offerings of the bonds issued under and secured hereby, to be made within some period prescribed in the said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding par value of said bonds and the then accrued interest for each such bond."

The section goes on to prescribe that if sufficient bonds are not offered to exhaust the said fund at less than par, then and in that event "The trustee shall by a notice in manner therein directed give notice that certain bonds to be drawn by lot are called for the purpose of investing therein the moneys paid to the trustee by the mortgagor company."

On May 2, 1907, the mortgagor company handed to the appellants the sum of $170,000 to be applied in the redemption of bonds according to the terms of the mortgage, and the appellants thereupon published the following advertisement:—

"The Dominion Copper Company, Limited.

"First Mortgage 6 per cent. Gold Bonds.

"The Dominion Copper Company, Limited, in accordance with

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the requirements of its mortgage, dated the 1st June 1905, securing the above issue, has paid out of its earnings the sum of one hundred and seventy thousand dollars ($170,000) to the National Trust Company, Limited, trustee under the mortgage to be applied in the redemption of bonds as provided by the mortgage. Offerings of the bonds for sale as of 1st June 1907, exclusive of interest coupon maturing on that date, stating the amount offered and price for delivery at the office of the undersigned, at Toronto, Ontario, will be received by the undersigned up to and inclusive of 25th May 1907.

"National Trust Company, Limited."

The respondent answered the said advertisement and duly offered $10,000 bonds at $82 per bond of $100.

The following is a convenient summary of all the tenders at prices below par:—

Rate.	Par value.	Offered at.
	$	$
Under 80	39,400.00	30,937.75
80-86 inclusive	102,600.00	84,804.95
86.8 (Untermeyer) . . .	195,700.00	170,000.00
Over 86.8	25,600.00	24,043.00
	363,300.00	309,785.70

It will be observed that Mr. Untermeyer offered bonds to the nominal value of $195,700 at the price of 86.8, which was just enough to exhaust the fund. The appellants naturally treated this as an indivisible offer, and, wishing to buy all the bonds (including the plaintiff's) which were offered at lower prices, they asked Mr. Untermeyer whether, if they did so, he would be willing to offer sufficient bonds at 86.8 to exhaust the balance of the fund.

After correspondence and interviews, with which it is not necessary to deal in detail, it was ultimately agreed that the appellants might buy bonds amounting to $39,400 at rates less than 80, if he, Mr. Untermeyer, would offer bonds of the nominal value of $160,600 for the balance of the sinking fund. By this means the appellants succeeded in obtaining bonds amounting to $200,000 for the money at their disposal, whereas if they had accepted all the offers (including the plaintiff's) below 86, and

Untermeyer had withdrawn his offer, as he would have done if the terms ultimately arranged had not been agreed to, they would only have got bonds below par amounting to $142,000, and would have been obliged to expend the balance of the fund in purchases at par.

The plaintiff's offer was therefore declined. A great fall in the price of copper afterwards took place by which the Copper Company lost heavily, and it is now in liquidation.

At the trial Riddell J. decided in favour of the appellants, and further held that, even if they were wrong in refusing the plaintiff's offer, they had acted honestly and carefully, so that they were entitled to be excused both under the Provincial Trustee Act and the provisions in that behalf of the trust deed itself. This decision was reversed by a majority of three judges to two in the Court of Appeal for Ontario, and judgment was entered for the plaintiff for $700, with costs.

Their Lordships are of opinion that the appellants properly fulfilled the obligation cast upon them by article 2, section 12, of the trust deed. There can be no doubt as to the object of that section. It was intended by all the parties to the deed that the appellants should obtain as many bonds as possible with the money placed at their disposal, and they were accordingly directed to select, from the bonds tendered, those which were cheapest.

As Riddell J. pointed out, on a strictly literal construction of the words of the clause, the obligation of the appellants to purchase "those bonds which are offered to it at the lowest price" does not expressly extend beyond the particular lot which is offered at a price lower than any other lot to buy, leaving the trustees without any directions as to how they were to select from the other bonds, but no one has suggested such a construction except for the purpose of dismissing it as wholly unreasonable when tested by the object of the clause. The Court must, if possible, construe the clause so as to give effect to the plain intent of the parties. In buying bonds the appellants had to consider number as well as price. Indeed a low price was only important because it facilitated the acquisition of a large number. Under these circumstances, "the lowest price" meant the price which was lowest as applied to the whole block purchased. If the appellants had purchased the small lot of bonds offered by the plaintiffs at 82, and had been unable, in consequence of that purchase, to complete the bargain with Untermeyer, the price given for the whole block of bonds purchased would certainly not have been the lowest price at which an equal number of bonds could have been purchased under the agreement with Untermeyer, and by the acceptance of his offer.

In this view of the case, it is unnecessary to consider the points raised as to contract or trust, or the further question which would arise if an obligation on either of these grounds could be shewn to exist between these parties, namely, how far a trustee or agent can be made liable for an honest and reasonable misinterpretation of ambiguously worded instructions; for in neither alternative did the appellants commit any breach.

Their Lordships have therefore humbly advised His Majesty that this appeal should be allowed, the judgment of the Court of Appeal set aside, and the judgment of Riddell J. restored, with costs in both Courts.

The respondent will pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Bischoff, Coxe, Bompas & Bischoff.*

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[PRIVY COUNCIL.]

COMMISSIONERS OF TAXATION OF NEW SOUTH WALES . . . . APPELLANTS;

AND

ERNEST HENRY ADAMS . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Law of New South Wales—Land and Income Tax Assessment Act, 1895, *s.* 27, *sub-ss. I. and VI.—Land and Income Tax Assessment Act*, 1904, *s.* 3, *sub-s.* 2 *—Construction.*

Sect. 27 of the New South Wales Land and Income Tax Assessment Act of 1895 provided by sub-s. 1 that the amount of taxable income for the year preceding the year of assessment should be taken as the basis of calculating the income tax payable, and by sub-s. 6 that in all other cases, i.e., not specified in preceding sub-sections, the taxable amount shall be the total amount of income from all sources less authorized deductions. Sect. 3, sub-s. 2, of an amending Act of 1904 re-enacted the above sub-s. 1 expressly "subject to the provisions of section 27":—

Held, that sub-s. 6 applied to the respondent's case, whose income derived from the use of land was first assessable in 1907 and must be assessed as derived in that year. The other sub-sections mentioned above apply only where the taxpayer has been in actual receipt of taxable income in the year preceding the year of assessment, and not otherwise.

APPEAL by special leave from a judgment of the High Court (April 21, 1910) reversing a judgment of the Supreme Court of New South Wales (December 17, 1909) upon a special case stated by the District Judge sitting as a Court of review.

The appellants had assessed the respondent as the public officer of the Seaham Colliery Company, Limited, to income tax for 1907 in the sum of 402*l.* 15*s.* The Court of review confirmed that assessment, but at the request of the respondent stated a case under s. 45 of the New South Wales Land and Income Tax Assessment Act of 1895 (No. 15), called hereafter the principal Act.

The sum assessed was the amount of the income derived by the company during 1906 from the use of land in New South

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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Wales. The question decided was whether upon the true construction of the relevant sections in the principal and amending Acts the company's said income in 1906 must be deemed to be its taxable income for 1907.

Act No. 16 of 1895 imposed a land tax of a penny in the pound, and Act No. 17 an income tax of sixpence in the pound, "to be annually levied and paid under the provisions of the Land and Income Tax Assessment Act of 1895 (No. 15) and in the manner therein prescribed." Part IV. of No. 15 exempted from income tax all land subject to land tax under Parts II. and III., whether the incomes so derived were from ownership or the use or cultivation of the land.

Under the provisions of the Local Government Act, 1906, the exemption of the respondent's land from income tax was suspended. Meanwhile s. 3, sub-s. 2, of the Land and Income Tax (Amendment) Act, 1904, had provided that "subject to the provisions of section 27 of the principal Act" in assessing the income tax for 1905 or any subsequent year the taxable income for the year preceding assessment shall be the taxable amount for the year of assessment. Sect. 27, sub-s. 6, which with the above s. 3, sub-s. 2, are set out in their Lordships' judgment, provides that in all other cases, that is cases not mentioned in the previous sub-section, the taxable amount "shall be the total amount of taxable income arising or accruing from all sources except to the extent of the exemptions provided by section 17."

The respondent appealed from the assessment of 402*l.* 15*s.* on the ground that "as the said land was during 1906 subject to land tax the income derived by the said company from the use thereof during that year was exempt from income tax for the year 1907."

The District Court Judge held that the respondent was not entitled to the exemption claimed, but stated a special case raising the following question:—"Whether in assessing the amount of taxable income of the said company for the year 1907, the Commissioners are entitled to include the income derived by the company during 1906 from the use of land in coal mining, which land during the latter year was subject to land tax under Parts II. and III. of the principal Act."

The Supreme Court unanimously affirmed the decision of the District Judge. Pring J., who delivered the judgment, said that the answer to the question submitted depended on the meaning of the words "taxable income" in s. 3 (2.) of the Act of 1904, and after examining the relevant provisions of that Act and also of the principal Act of 1895, he stated his conclusion as being "that the words 'taxable income' in section 3 of the Act of 1904 cannot mean income subject to taxation but must mean income which if the present state of the law had existed in the previous year would have been subject to taxation."

The High Court by a majority (Isaacs J. dissenting) reversed this decision. Griffiths C.J. and O'Connor J. held upon the construction of s. 3 (2.) of the Act of 1904 that for the purpose of assessing the company to income tax for 1907 the amount of the company's taxable income from all sources for 1906 ought to be ascertained according to the law which was in force in 1906, and that as in 1906 the company had under the law then in force no income which was taxable for the purposes of income tax the taxable amount for 1907 was nil. In the words of O'Connor J., "The question is what is the right interpretation of section 3 of the Act of 1904? The expression 'taxable income' whether it is to be taken in the sense explained in the various sections of the principal Act or merely in accordance with the ordinary meaning of the words necessarily involves the notion of legal liability to be taxed. In other words the amount of the taxpayer's income which was taxable in 1906 can be ascertained only by applying some law to the facts of the income. What law? The section itself furnishes the answer. When it enacts that the amount which is taxable income for 1906 shall be the taxable amount for 1907 it directs as plainly as language can direct anything that the Income Tax Law of 1906 is to be applied to the income tax facts of 1906 and that the result is to be taken as the amount on which the income tax for 1907 shall be paid."

Isaacs J. did not agree with the views expressed by the Chief Justice and O'Connor J., but concurred in the decisions of the District Judge and the Supreme Court. The principal Act is, he points out, "an Act of a permanent nature not imposing taxation but for assessing it and must be looked at in order to see what kinds of incomes are chargeable." His Honour then examined the use and meaning of the phrase "taxable income" as occurring in sub-ss. 1 and 6 of s. 27 of the principal Act, and after noting that the latter sub-section is not repealed by s. 3 of the Act of 1904, he came to the conclusion that the expression "taxable income" as used in sub-s. 6 of s. 27 of the principal Act "originally meant and therefore still means income which is taxable according to the law of the assessment year."

Upjohn, K.C., and *Austen-Cartmell*, for the appellants, contended that the expression "the amount of taxable income from all sources for the year immediately preceding the year of assessment" as used in s. 3, sub-s. 2, of the Act of 1904 meant the amount which would have been taxable if the law in force during the year of assessment had been in force during such preceding year. Applying that construction of the sub-section, the respondent was assessable in 1907 for a sum equal to the income which his company had derived in 1906 from its ownership or use of its land.

Sir R. Finlay, K.C., and *C. Lacey Smith*, for the respondent, contended that his income in 1906 was not taxable. Therefore, as his taxable income for that year was nil, the assessable income for 1907 was also nil upon the literal construction of s. 3, sub-s. 2, of the Act of 1904, which as a taxing Act must be construed strictly in favour of the person charged. It was submitted that the true construction and intention of that sub-section were that the respondent's taxable income for 1907 was the amount which had been earned by the company during 1906 from all sources, subject to the exemptions and deductions allowed by the principal Act of 1895. No legislation had affected the respondent's right to exemption in 1906 in respect of land subject to land tax, and in consequence the High Court was right in holding that his taxable income for 1907 was nil.

Upjohn, K.C., in reply.

The judgment of their Lordships was delivered by

1912
Feb. 21.

LORD MACNAGHTEN. This appeal raises a question under the Land and Income Tax Assessment Act of 1895, No. 15 of 1895, as amended by the Act No. 17 of 1904. The appeal is against a judgment of the High Court of Australia, reversing by a majority of two learned judges to one the judgment of the Supreme Court of New South Wales on a special case. The case was stated by the Court of review under s. 45 of the Act of 1895, which in the Act of 1904 is called the "principal Act." The appeal is by the Commissioners of Taxation, who obtained special leave to appeal on the terms of undertaking in any event to pay the respondent's costs as between solicitor and client.

In some aspects the situation is peculiar. If the High Court be right, the framers of the principal Act, on which evidently much thought and great care were bestowed, have made an extraordinary blunder, resulting in the present case in loss to the State of income tax on the income of the Seaham Colliery Company for the year 1907. The Supreme Court avoided this result by placing a non-natural construction on the words "taxable income," two plain English words, which seem to be capable of only one meaning. Oddly enough, the High Court adopts this non-natural construction for the year 1896, the year in which the principal Act came into operation, but refuses to carry it any further. So the Supreme Court answered the question proposed in the affirmative. The High Court answers it in the negative. To add to the confusion, a categorical answer, whether it be yes or no, seems to be irrelevant to the real issue. The question proposed does not follow the language of the Act, nor is it in their Lordships' opinion calculated to evoke a reply tending to elucidate the matter in controversy. The real and indeed the only question is this: Is the colliery company liable to income tax for the year 1907?

The principal Act does not impose taxation. It provides machinery for the collection and payment of land tax and income tax when imposed by Parliament.

The principal Act was passed on December 12, 1895. On the same day two other Acts were passed, the one imposing land tax and the other imposing income tax, as from January 1, 1896. They are numbered respectively 16 and 17 of 1895.

No. 17 of 1895 is in the following terms:—"From and after the 1st day of January 1896 there shall be annually levied and paid under the provisions of the Land and Income Tax Assessment Act of 1895, and in the manner therein prescribed, an income tax of sixpence in the pound on the amount of all incomes chargeable thereunder.

"This Act may be cited as the Income Tax Act of 1895."

No. 16 of 1895 imposed a land tax in similar terms.

Part II. and Part III. of the principal Act, ss. 10 to 14 both inclusive, deal with the collection and payment of land tax.

Sect. 15 in Part IV., which deals with income tax, provided that, subject to the provisions of the Act and the regulations thereunder, there should be charged, levied, collected, and paid to the Commissioners for the use of Her Majesty an income tax at such rate per pound as Parliament should from time to time declare and enact in respect of the annual amount of all incomes exceeding 200*l.* per annum, arising or accruing, as specified in four sub-sections. The 4th sub-section is in the following terms:—(IV.) "Arising or accruing to any person wheresoever residing from any kind of property (except from land subject to land tax as hereinafter specifically excepted), or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

Sect. 17, among other exemptions, specifically excepts or exempts—(VII.) "Income derived from the ownership of land subject to land tax under Parts II. and III. of" the "Act," and (VIII.) "Income derived directly from the use or cultivation of land subject to land tax under Parts II. and III. of" the "Act."

Sect. 27, so far as material, is in the following words:—"For the purpose of ascertaining the sum hereinafter termed the 'taxable amount' on which, subject to the deductions hereinafter mentioned, income tax is payable, the following directions and provisions shall be observed and carried out:—I. "The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation."

Next follow sub-ss. II., III., IV., and V., some of which qualify the provisions of sub-s. I., while others are of general application, and then comes sub-s. VI.

VI. "In all other cases the taxable amount shall be the total amount of taxable income arising or accruing from all sources except to the extent of the exemptions provided by section 17."

Sect. 28 specifies deductions which may be made from the "taxable amount," and so there is brought out the "income chargeable," an expression defined by the Act as the "taxable amount less the deductions allowed under" the "Act."

Now it is conceded that income tax was properly payable for the year 1896 although no income tax was imposed by Parliament before the commencement of that year.

It was common ground that the income of the Seaham Colliery Company was wholly derived from the use of land, and that so long as land tax was payable by the company the company was exempt from income tax.

On January 1, 1907, the Local Government Act, 1906, came into operation. Under that Act local government areas were constituted, some of which were designated "municipalities" and others "shires." From January 1, 1907, the land of the Seaham Colliery Company was included in a shire; shire rates became payable by the company in respect thereof, and as from that date, under or by virtue of a proclamation duly issued by the Governor in accordance with the provisions of the Act, the operation of the enactments contained in the principal Act relating to exemption from income tax in consequence of liability to land tax were "suspended."

In the meantime the Land and Income Tax (Amendment) Act, 1904, had been passed. That Act, s. 3, sub-s. 1, repealed the first of the directions and provisions contained in s. 27 of the principal Act as from January 1, 1905, and contained the following enactment:—

Sect. 3, sub-s. 2. "In assessing the income tax for the year 1905 or any subsequent year the amount of taxable income from all sources for the year immediately preceding the year of assessment shall, subject to the provisions of section 27 of the principal Act, be the taxable amount for the year of assessment."

The drafting of the Act of 1904 is perhaps rather clumsy, but the meaning is perfectly clear that s. 27 of the principal Act is to be read as if s. 3, sub-s. 2, of the Act of 1904 were substituted for sub-s. 1 of s. 27.

In these circumstances the respondent contended that the company was not liable to be assessed for income tax for the year 1907 on the ground that in the preceding year it had no taxable income, that is, no income liable to income tax.

The Supreme Court held that the same non-natural construction of the words "taxable income" which both the Supreme Court and the High Court thought applicable to the first year of taxation should be applied to the present case. The expression "taxable income" in their opinion meant income which would have been taxable if the Income Tax Code had applied to it. The High Court thought that although that construction was admissible for the year 1896 it was not admissible for any subsequent year.

Their Lordships think that s. 3, sub-s. 2, of the Act of 1904 is not applicable in the present case. They are of opinion that that sub-section as well as the original sub-s. 1 of s. 27 of the principal Act is only applicable when the taxpayer has been in receipt of "taxable income," that is, income liable to income tax in the year preceding the year of assessment, and that in all other cases as provided by sub-s. 6 of s. 27, and in the language of that sub-section, the "taxable amount" is "the total amount of taxable income arising or accruing from all sources" during the year of assessment "except to the extent of the exemptions provided by section 17."

If this is not the meaning of the Act, what is to happen in the case of a man who starts a new business while the Income Tax Code is in operation, and, during the first year of trading, makes an income in excess of the non-taxable limit? Is he to pay no income tax? Apparently according to the view of the Supreme Court he would pay no income tax for the first year, assuming, of course, that he had no taxable income before he started in business. For, although you may perhaps find taxable income in income not in fact taxable simply by supposing the taxing Act to be antedated, it surely passes the wit of man to find a taxable income where there is no income to be found. According to the view of the High Court, logically carried out, a trader in such a position never would pay income tax so long as he carried on the business and had no other source of income. If he is not to pay for the first year it is difficult to see how he can be called upon to pay income tax for any succeeding year. Take a more striking instance still, suppose A. carries on a successful business producing (say) 20,000*l.* a year, on which he is paying income tax, and suppose B., engaged in the same trade, is equally prosperous and pays income tax on a like amount, and suppose they agree to combine and form themselves into a limited company or sell their businesses to a limited company which makes in its first year as much more than A. and B. together made in the preceding year. Is the company to pay no income tax for the first year? It certainly had no taxable income during the preceding year. It had no income at all. It was not in existence. Apparently the only way its income could be reached during the first year of its existence would be under sub-s. 6. It seems to their Lordships that for 1896, the first year of income tax taxation, all taxable incomes fell under sub-s. 6, and that in all subsequent years, in all cases where there is no income, or no taxable income during the year preceding the year of assessment, recourse must be had to sub-s. 6.

Their Lordships have some difficulty in understanding why it was that in the High Court as well as in the Supreme Court, and in the argument before this Board even in reply, it was sought to confine attention to sub-s. 1 of s. 27 of the principal Act and the enactment substituted for it by the Act of 1904. When the point which weighs most with their Lordships was put to the learned counsel for the respondent he admitted that a new business could not hope to escape taxation for the first year of trading, though there were no income or no taxable income for the year immediately preceding the year of assessment. That was inconceivable; in such a case perhaps sub-s. 6 might, he thought, be applicable. But certainly, unless their Lordships are mistaken, no plausible suggestion was made of any other means by which the income in question could be reached.

It seems to their Lordships tolerably plain that in cases where there is taxable income for the year immediately preceding the year of assessment the amount of such income is not to be "included" in assessing the amount of taxable income for the year of assessment as suggested by the question proposed in the

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special case—for that is not the language of the Act—but is, in the language of the Legislature, "the taxable amount for the year of assessment," and that in all other cases, that is in all cases where there is no taxable income for the year immediately preceding the year of assessment, the rule laid down in sub-s. 6 must be observed.

If the view which commends itself to their Lordships is accepted, there can be no difficulty in any case. Returns for a current year must be in the nature of estimates—estimates more or less accurate according to circumstances, but still estimates and nothing more and in a sense provisional. The Commissioners have now as full power as they ever had of requiring returns from time to time, of redressing injustice, and of relieving taxpayers from mistakes and overpayments.

Their Lordships will humbly advise His Majesty that the order of the High Court should be discharged except as to costs, and that the question proposed by the special case should be answered by saying that the income derived by the company during 1906 from the use of land in coal mining is not to be included in assessing the amount of taxable income of the company for the year 1907, but that the company is chargeable for income tax for the year 1907, under the provisions of sub-s. 6 of s. 27 of the principal Act.

In accordance with their undertaking the appellants will pay the costs of the respondent as between solicitor and client.

Solicitors for appellants: *Light & Fulton.*
Solicitor for respondent: *J. H. Galbraith.*

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Jan. 17, 18;
Feb. 21.

[PRIVY COUNCIL.]

ROWLAND VALENTINE WEBSTER . . . PLAINTIFF;

AND

WILLIAM DAVID BOSANQUET . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Damages for Breach of Contract — Liquidated Damages or Penalty — Construction.

Where a contract provides that on breach thereof a specified amount should be paid "as liquidated damages and not as a penalty" its true construction must have regard to the particular circumstances of the case and not be such as to render it unconscionable and extravagant. Where it is impossible at the date of contract to foresee the extent of uncertain injury which might be sustained by its breach, or the cost and difficulty of proving it, and the amount is reasonable, it should be recovered as liquidated damages.

Clydebank Engineering, &c., Co. v. *Don José Castaneda* [1905] A. C. 6, followed.

APPEAL from a judgment of the Supreme Court (December 21, 1909) reversing a judgment of the District Court of Colombo (March 1, 1909).

The action was brought by the appellant to recover 500*l.* as liquidated damages as provided by a clause of an agreement between appellant and respondent set out in their Lordships' judgment in respect of a breach thereof committed as therein stated.

The sole question decided was whether the stipulated sum was by way of liquidated damages or as a penalty.

The Supreme Court held that it was a penalty.

The material portion of the judgment of Middleton A.C.J. is as follows: "I have gone through the terms of the contract, and it seems to me as put by counsel for the appellant that a strict enforcement of the penal clause on the footing it was liquidated damages for a series of trifling breaches in neglecting to give the option of purchase for small breaks or in selling even a pound of tea on occasions to some prohibited persons might involve the defaulting party in the first case in many thousands of pounds worth of damages, and in the second in the sum of 500*l.* at least. I therefore hold that the parties had not pre-estimated their damages by the words they used, but intended that the sum of 500*l.* should be a prohibitive penalty to cover the real damages incurred upon estimation."

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

Alexander Grant, K.C., and *Owen Thompson*, for the appellant, contended that in the events which happened the respondent was under an obligation to pay 500*l.* to the appellant as liquidated damages. Even if it were a penalty the respondent was not relieved against payment of the said sum in full. It was a considered agreement. It was reasonable to fix a sum beforehand as the estimated damages for breach, for the amount of damage was not easy to foresee and might be difficult and expensive to prove. Reference was made to *Kemble* v. *Farren* (1); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2); *Public Works Commissioner* v. *Hills* (3); *Clydebank Engineering, &c., Co., Ld.* v. *Don José Castaneda* (4); *Pye* v. *British Automobile Commercial Syndicate.* (5)

Upjohn, K.C., and *Corbet*, for the respondent, contended that according to the true construction of the contract the intention of the parties was for a penalty, and that on the evidence the damages actually sustained by the appellant were trifling. The 500*l.* was stipulated for in case of several and dissimilar breaches of varying degrees of importance, shewing that a pre-estimate of damages was inapplicable to all the cases contemplated. There was no difficulty in proving the actual damage complained of in this case, which on the evidence was trivial. The only serious damage contemplated was if the respondent should fail to offer tea at the stipulated valuation or price when that price had gone up in the open market, and then the amount of damage was easily ascertained by comparing the two prices, the price at Colombo valuation and the price at public auction. Reference was made to *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2), *Willson* v.

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(1) (1829) 6 Bing. 141, 147.

(2) (1886) 11 App. Cas. 332, 342.

(3) [1906] A. C. 368, 375.

(4) [1905] A. C. 6.

(5) [1906] 1 K. B. 425.

Love (1) and the authorities cited on p. 630, and to the established principle laid down by Lord Halsbury in [1905] A. C. 10.

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

1912
Feb. 21.

LORD MERSEY. This is an appeal from a judgment of the Supreme Court of Ceylon, dated December 21, 1909, reversing a judgment of the District Court of Colombo, dated March 1, 1909. The question raised by the appeal is whether a payment stipulated by deed to be made by the defendant to the plaintiff is to be regarded as a payment by way of liquidated damages or merely as a penalty.

The Court of first instance held that the stipulation was for a payment by way of liquidated damages; the Supreme Court took a different view and held that the stipulation was for a penalty only.

There is no dispute about the facts of the case, and they are as follows:—

In 1891 the plaintiff and the defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon certain estates in the island belonging to the defendant and known as the Palamcotta and Marawilla estates. The part of the plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea, and this he did so successfully that by the year 1895 he had established a valuable trade. In that year the partnership was dissolved, the plaintiff buying the defendant's interest in the goodwill for a sum of 3500*l.* and taking over the assets at a valuation. The dissolution was effected by a deed dated February 14, 1895, which contained among other things a provision that the defendant should for a period of ten years after July 30, 1896, sell the whole or any part of the crops of the Marawilla and Palamcotta estates to the plaintiff at a valuation so long as the plaintiff should pay to the defendant yearly a sum of 75*l.* for the use of the names of the two estates, and should express his intention of purchasing the whole or any part of the said crops. The deed then provided as follows: "And the said

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(1) [1896] 1 Q. B. 626.

Bosanquet shall not be at liberty to sell during the period aforesaid the whole or any part of the tea crops of the Marawilla and/or Palamcotta estates to any person other than the said Webster without first offering to the said Webster the option of buying the same, so long as Webster shall pay to Bosanquet the yearly payment of 75*l.*; and if the said Bosanquet shall fail, neglect, or refuse to sell the whole or any part of the crop of the Marawilla and/or Palamcotta estates as hereinbefore provided to the said Webster, he shall pay to Webster the sum of 500*l.* as liquidated damages and not as a penalty."

The plaintiff duly performed his part of this agreement, but in the first half of the year 1906 the defendant, in breach of the agreement, sold to persons other than the plaintiff five different parcels of tea of the Palamcotta crop, amounting in the aggregate to 53,315 lbs., without offering to the plaintiff the option of buying the same. In February, 1908, the plaintiff issued his writ in the present action, claiming the sum of 500*l.* as liquidated damages in respect of the said breach. It was alleged (and found as a fact at the trial) that the sales had been made by the defendant under a mistake of fact as to the date on which the obligation to give the option of purchase to the plaintiff terminated, but the learned judge held this to be immaterial, and being of opinion that the stipulation for the payment of the 500*l.* meant what it said, namely, that it should be by way of liquidated damages, gave judgment for the amount claimed. The Supreme Court overruled this decision and sent the case back to the Court of first instance to ascertain the actual damage sustained by the plaintiff by reason of the breach. On the rehearing the plaintiff offered no evidence as to damages, and the Court awarded the plaintiff by way of nominal damages the sum of 10*l.*, which amount the defendant had brought into Court in satisfaction of the plaintiff's claim. The question is which view of the contract is right.

The cases in which the Courts have had to consider whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid, or merely as a penalty covering the damages though not assessing them, are innumerable and perhaps difficult to reconcile. But it is unnecessary to examine them, for their effect is sufficiently and very clearly stated in the case of *Clydebank Engineering, &c., Co., Ld.* v. *Don José Castaneda.*(1) From that case it appears that whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced. After stating this principle Lord Halsbury proceeded as follows: "It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case."

And Lord Davey, in delivering his opinion, says: "You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Applying the principle to be found in these judgments to the facts of the present case the proper construction to be put upon the contract appears to their Lordships to be plain. When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense. This consideration also afforded a reason for fixing the amount beforehand. It was suggested in the course of the argument that to treat the 500*l.* as liquidated damages might involve such extravagant consequences as to render the agreement absurd, for the sum might be claimed in respect of every pound of tea sold in breach of the stipulation. Their Lordships, however, are of opinion that the stipulation is not capable of such an interpretation. The parties to the agreement were merchants using

(1) [1905] A. C. 6.

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language in the sense in which it is used in their trade. When they speak of a "part of a crop" they are not contemplating packets which might be sold over a grocer's counter, but parcels such as were in fact sold in the present case. Moreover, the breach consists of the selling to third parties. It matters not whether the sale is of the whole or of part of a crop, nor whether it is made in one lot or in many. The agreement neither says nor means that, if successive parcels forming parts of the same crop be sold, a right to claim 500*l.* in respect of each sale shall accrue; all such parts put together cannot amount to more than the whole crop, and the penalty for the sale of the whole is limited to the 500*l.*

For these reasons their Lordships are of opinion that the contract stipulates for what in words it says, namely, for a payment of money by way of liquidated damages and not by way of penalty.

They will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside, and the original judgment of the District Court restored. The respondent must pay all the costs in the Courts below and also the costs of this appeal.

Solicitors for appellant: *Abbott & Hudson.*

Solicitors for respondent: *Stannard & Bosanquet.*

J. C.*

1912

Jan. 18;
Feb. 28.

[PRIVY COUNCIL.]

JOHN LEMM . . . . DEFENDANT;

AND

THOMAS ALEXANDER MITCHELL . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong Ordinance No. 20 *of* 1908—*Construction—Res Judicata—Criminal Conversation—Action dismissed as incompetent before the Ordinance—Enactment of a Right of Action did not annul subsisting Judgment.*

Hong Kong Ordinance 20 of 1908 by its retroactive effect gave a right of action for criminal conversation committed prior to its enactment:—

Held, that without explicit words to that effect it did not avail the respondent, whose cause of action was barred as res judicata by a final judgment prior to the Ordinance and founded on the then existing law.

APPEAL from a judgment of the Full Court of the Supreme Court (July 11, 1910) dismissing an appeal from three judgments of the Supreme Court in its original jurisdiction (June 9, September 17, December 8, 1909).

The respondent, a domiciled Scot, brought an action in the Court of Session, Edinburgh, against his wife, residing in Hong Kong, for divorce on the ground of her misconduct committed with the appellant in Hong Kong during the years 1899 to 1905. The Hong Kong Court had no divorce jurisdiction. On November 7, 1906, a decree for divorce was made, the appellant not having been made a party to the action.

On July 29, 1907, the respondent sued the appellant in the Supreme Court of Hong Kong for damages for criminal conversation. The appellant pleaded that the Court had no jurisdiction to entertain it.

On May 5, 1908, Piggott C.J. held that the action was not maintainable, for the provisions of the English Divorce Act of 1857, which abolished the action of criminal conversation, had by the Ordinances of Hong Kong been applied to that Colony.

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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On December 11, 1908, an Ordinance, set out in their Lordships' judgment, was passed which gave a right to the respondent to bring such action.

On December 19, 1908, he did so, claiming $15,000 as general damages for precisely the same acts of misconduct as alleged in the former action, and a further sum as special damages, meaning the costs and expenses of the divorce proceedings in Edinburgh. The question decided in this appeal was whether the action so brought was barred as res judicata.

In the first of the three judgments appealed from to the Full Court the Chief Justice said that in order to establish the plea of res judicata "the previous judgment must have been on the merits; clearly the previous judgment which is relied on in this case was not on the merits, but on a highly technical construction of certain legislation in the Colony"; and further, "what has the previous judgment of this Court decided? The answer is that the right of action had been destroyed by a certain Ordinance; but *this* action depends on the fact that the right of action has been retrospectively restored to life; and it follows that the point in issue in this action which is the merit of the plaintiff's claim, although raised in the former action, has never been decided," and further, "whether as a fact the defendant did have criminal conversation with the plaintiff's wife, as is alleged, is still a question to be decided."

By the second of the said judgments the Chief Justice entered judgment for the respondent for $7500 general damages which had been awarded by the jury. By the third the Supreme Court largely increased this amount in respect of special damages. The Full Court affirmed this judgment.

Duke, K.C., and *Compston*, for the appellant, referred to the applicable Ceylon Ordinances, namely, No. 6 of 1845; No. 2 of 1846, s. 3; No. 3 of 1873; No. 5 of 1858, s. 1; the English Divorce Act of 1857, ss. 35 and 59; No. 5 of 1860, s. 1; the Interpretation Ordinance of 1897 (No. 8), which repealed a former Interpretation Ordinance No. 3 of 1895; and also to Ordinance 20 of 1908, s. 2. The result was that from 1858 to 1860 there was no action of this kind permitted by law; while

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from 1860 onwards such action was allowed by force of retrospective legislation. The respondent, however, had brought his action prior to the Ordinance which permitted it. Rightly or wrongly it had been dismissed because no legal remedy existed at the time of which he could avail himself. The relief now sought was identical with that which had already been adjudicated upon, and the appellant could not be sued a second time. The effect, moreover, of Ordinance 20 of 1908 was only to establish a right of action for wrongs which had not already been put in suit. It was not intended to reverse a decision already given. Ordinance No. 8 of 1897, s. 11, was applicable, which enacts that the repeal of an Act does not affect anything duly done or any right acquired thereunder. Reference was made to the judgment of Tindal C.J. in *Kay* v. *Goodwin* (1); *Eyre* v. *Wynn-Mackenzie* (2); *Poulton* v. *Adjustable Cover and Boiler Block Co.* (3)

[They were stopped by their Lordships.]

E. H. Sharp, K.C., and *A. C. Nesbitt*, for the respondent, contended that the action was not barred by the plea of res judicata. The facts and matters in issue in this action were not disputed or adjudicated upon finally or at all in the former action brought in 1907. And the judgment of May 5, 1908, was not on the merits of that action and disclaimed the intention of expressing any opinion thereon. It was final only upon a preliminary issue of law as to the nature of the jurisdiction invoked by the respondent in the former action. It decided upon the construction of certain retrospective provisions in the Interpretation Ordinances then in force that under the law then existing it had no jurisdiction to entertain the action. Under the law now existing the Court has jurisdiction to adjudicate upon the respondent's action and has exercised it, giving to him after a long investigation before a jury a decree for damages based upon the verdict of a jury. It was contended that under these circumstances the former judgment, being of a Court which was incompetent by law to entertain the action, was no bar to the present action. The appellant was not twice vexed or twice in jeopardy on the same cause of action, for the Court in the former instance had no power to deal with the

(1) (1830) 6 Bing. 576.
(2) [1896] 1 Ch. 135.
(3) [1908] 2 Ch. 430.

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merits or to decree against the appellant. Reference was made to *Barrs* v. *Jackson* (1); *Langmead* v. *Maple* (2); *Nelson* v. *Couch.* (3) The appellant had not obtained such a determination of the respondent's claim as the law considered conclusive: see *Outram* v. *Morewood* (4); *Young* v. *Adams.* (5)

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

1912
Feb. 28.

Lord Robson. The appellant in this case was the defendant in an action to recover damages for criminal conversation brought by the respondent in the Supreme Court of Hong Kong (original jurisdiction) on December 19, 1908. To that action he pleaded res judicata. The learned Chief Justice held the plea to be bad, and on appeal to the Full Court his decision was affirmed.

In the year 1906 the respondent was a master mariner living with his wife at Hong Kong, where the appellant also resided. The respondent in that year commenced a suit in the First Division of the Court of Session, Edinburgh, for the dissolution of his marriage with his wife on the ground of misconduct with the appellant, who was not a party to the action, and in November, 1906, the marriage was dissolved. Afterwards, on July 29, 1907, the respondent commenced an action of criminal conversation in the High Court of Hong Kong against the defendant-appellant to recover damages for the misconduct above mentioned. In that action the defendant pleaded that the Court had no jurisdiction in respect of the alleged cause of action. The point of law thus raised was set down for hearing, and was heard by the learned Chief Justice, who, on May 5, 1908, delivered judgment in favour of the defendant-appellant and dismissed the action with costs.

It is unnecessary for the purposes of the present case to go in detail through the various Ordinances of the Colony on which the learned Chief Justice based his judgment in the action just mentioned. It is sufficient to say that, in his view, the introduction of the English Divorce Act, 1857, into the Colony by Ordinance 5 of 1858 had abolished the common law action for criminal

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(1) (1845) 1 Ph. 582; S. C. 1 Y. & C. 585.

(2) (1865) 18 C. B. (N.S.) 255.

(3) (1863) 15 C. B. (N.S.) 99.

(4) (1803) 3 East, 327.

(5) [1898] A. C. 469.

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conversation in Hong Kong; that on the repeal of Ordinance No. 5 of 1858 by Ordinance No. 5 of 1860 the action for criminal conversation was revived, but that by the retroactive effect of certain subsequent enactments, more particularly Ordinance No. 3 of 1895, the right to bring that action in the Colony was again abolished. The learned judge went on to intimate that if the Attorney-General of the Colony read his judgment he had no doubt that he would immediately take steps to procure the alteration of the law as it then stood so as to bring the action for criminal conversation again into existence in Hong Kong.

Accordingly a new Ordinance, No. 20 of 1908, was passed on December 11, 1908. It was entitled "An Ordinance to amend the Interpretation Ordinance, 1897 (Ordinance No. 8 of 1897), and to remove an ambiguity in the construction of the same." Sect. 2 was as follows: "Notwithstanding the repeal of Ordinance No. 3 of 1895 by Ordinance No. 8 of 1897, section 4 of Ordinance No. 3 of 1895 is hereby further repealed, and its effect on existing legislation is hereby declared to have been and to be inoperative and of none effect, and the Ordinances thereby affected are hereby declared not to have been affected, but to have remained and to remain of the same force and effect as if the said section 4 of the last-named Ordinance had not been enacted."

The effect of this Ordinance was undoubtedly to revive the right of action for criminal conversation in Hong Kong, if it had ever been in fact suspended. It is also clear that the Ordinance had a retroactive effect to the extent of enabling actions to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony, but the question now to be determined is whether it went further, and operated to annul a valid and subsisting judgment as between parties whose rights had been duly determined under and according to the law which existed before the new Ordinance was passed. The respondent assumed that it did, and on December 19, 1908, he instituted the present suit against the appellant in respect of precisely the same acts of misconduct as he had alleged in his former action.

The defendant-appellant then raised the plea of res judicata, and that point of law was argued before the Chief Justice apart from the other questions arising in the action. The learned judge overruled the plea on the ground that there had been no judgment on the merits of the case. In his view all that had been decided was that at the time of the former judgment the Court had no jurisdiction to hear the action. That technical difficulty in the plaintiff's way was, he said, removed by the new Ordinance No. 20 of 1908, and therefore the merits of the case could, for the first time, be considered by the Court.

The action accordingly came on for trial before a judge and jury, and the jury found in favour of the present respondent and awarded him $7500 by way of general damages.

There were other issues between the parties as to certain special damage claimed by the respondent which were separately tried, and as to which judgments passed on September 17, 1909, and December 8, 1909, substantially in the respondent's favour. Those judgments are also included in the present appeal, but in the view taken by their Lordships of the issue as to res judicata it is unnecessary to discuss them.

The appellant appealed to the Full Court, consisting of the Chief Justice and the acting puisne judge, Mr. Hazeland, and on July 11, 1910, judgment was delivered dismissing the appeal with costs.

Their Lordships are unable to agree with the decision of the Supreme Court.

The contention that the judgment of May 5, 1908, only decided a preliminary point as to the jurisdiction of the Court is far from being an exact account of the proceedings. The substance of the question then tried was whether or not the law of the Colony gave the plaintiff a remedy on the facts alleged. It was decided that it did not, and the defendant thereupon became entitled, on those allegations, to a judgment dismissing the whole claim. This result was not due to any defect in the jurisdiction of the Supreme Court, which was ample, but to a shortcoming in the general law. In the absence of appeal the judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, unless it be excluded by the Legislature in explicit and unmistakable terms. That is not the case here.

The law applicable to the case is shortly and sufficiently stated by Tindal C.J. in *Kay* v. *Goodwin* (1), where he says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."

The exception there stated covers the present case.

The Ordinance No. 20 of 1908 under which this action has been brought is certainly phrased in rather remarkable terms, It deals with an Ordinance (No. 3 of 1895) which it describes as already repealed, and declares that, so far as a particular section is concerned, it is thereby further repealed, so that Ordinances affected by it are declared not to have been affected, but to have remained as if it had not been enacted at all. This language is only an expansion, in rather emphatic terms, of the statement of principle affirmed by Tindal C.J., and is subject to the same qualification or exception as he expressed, namely, that it must not be taken to deprive persons of vested rights acquired by them in actions duly determined under the repealed law.

It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of law in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be allowed, and that the judgments of June 9, 1909, September 17, 1909, December 8, 1909, and July 11, 1910, in favour of the respondent, be set aside, and judgment entered for the defendant with costs.

Solicitors for appellant: *Gedge, Fisk & Gedge.*

Solicitors for respondent: *Church, Adams & Prior.*

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(1) 6 Bing. 576.

[PRIVY COUNCIL.]

J. C.*
1912
Jan. 18, 19; Feb. 22.

MOST REVEREND ROBERT DUNNE AND ANOTHER . . . . DEFENDANTS;

AND

JAMES BYRNE . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Will—Construction—Charitable Bequest—Fund to be expended for the Good of Religion—Religious Purposes.

Held, that a residuary bequest "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese" is not a good charitable bequest and is void. The expression used by the testator is not identical with the expression "for religious purposes."

APPEAL by special leave from a judgment of the High Court (December 16, 1910) varying a judgment of the Supreme Court of Queensland (May 12, 1910).

The question decided was whether the residuary bequest set out in their Lordships' judgment in the will of Denis Joseph Byrne was void as not being a good charitable gift or for uncertainty or otherwise.

On August 12, 1909, the respondent as one of the next of kin of the testator sued his executors, the appellants, for a declaration that he was entitled inter alia to a share in the residue of the estate on the ground that the disposition of the said residue was not a good charitable disposition and was void for uncertainty. On March 3, 1910, a special case was stated by consent for the opinion of the Supreme Court submitting amongst other questions that of the validity of the said disposition.

The Supreme Court declared that the residuary bequest was not void, but upon a good charitable trust, and that the residuary estate should be handed to the Archbishop as the person to whom the testator had committed the administration of the trust. The Chief Justice said: "In the absence of any qualifying words we think that this gift ought to be construed as a gift for the permanent endowment of the archbishopric and would be perfectly good as a gift to charity"; and further that there was nothing in the words used which liberates any part of the residue from that overriding trust.

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

The High Court by a majority of three to two substituted for this decision a declaration that the residuary bequest was void as not being a good charitable bequest.

Buckmaster, K.C., and *Galbraith*, for the appellant, contended that on the true construction of this residuary bequest it was a valid bequest. As a gift to the Archbishop and his successors it was a gift for religious purposes and a good charitable gift. *Thornber* v. *Wilson* (1), *In re Delany* (2), and *In re Garrard* (3) were cited as to the effect of a gift to a man holding a religious office. His official character proved the intention of the gift, and any uncertainty in its terms should not be exaggerated. It was a good charitable bequest, and if the direction had stopped there it was submitted that its validity could not have been disputed. It was contended that the direction to apply the fund in such manner as the trustee might judge most conducive to the good of religion was equivalent to a gift for religious purposes. The gift is in such terms as to shew that the charitable purposes were the paramount intention of the testator, the trustee having merely a discretion as to the time and manner of applying the fund thereto, but such discretion must be exercised in favour of charitable purposes which are sufficiently designated by the will. Reference was made to *In re Davidson* (4); *Grimond* v. *Grimond* (5); *In re White* (6); *Hunter* v. *Attorney-General* (7); *Cocks* v. *Manners* (8); *Townsend* v. *Carus* (9); *Attorney-General* v. *Wax Chandlers' Company*. (10)

Danckwerts, K.C., *P. F. Wheeler*, and *Power*, for the respondent, contended that the validity of the bequest depended upon whether the trust created was so certain in its terms as to admit

(1) (1858) 4 Drew. 350.
(2) [1902] 2 Ch. 642, 647.
(3) [1907] 1 Ch. 382.
(4) [1909] 1 Ch. 567.
(5) [1905] A. C. 124.
(6) [1893] 2 Ch. 41.
(7) [1899] A. C. 309.
(8) (1871) L. R. 12 Eq. 574.
(9) (1844) 3 Hare, 257.
(10) (1870) L. R. 5 Ch. 503, 507.

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of being executed without the exercise of discretion, one which the Court would be obliged to apply to charitable purposes. This fund was to be used and expended wholly or in part as the Archbishop might judge most conducive to the good of religion. That raises a trust so uncertain that the Court could neither execute nor control it. "Wholly or in part" is a phrase sufficient to import uncertainty into the direction. It would be in the discretion of the Archbishop to apply this fund to other than charitable objects, to purposes which he might think conducive to the good of religion whether in law charitable or not. Reference was made to *Hunter* v. *Attorney-General* (1), *In re Freeman* (2), *Cocks* v. *Manners* (3), *In re Macduff* (4), and *In re Davidson*. (5)

Buckmaster, K.C., in reply.

The judgment of their Lordships was delivered by

1912
Feb. 22.

LORD MACNAGHTEN. The Reverend Denis Joseph Byrne, a Roman Catholic clergyman in charge of the Roman Catholic mission at Dalby, in the State of Queensland, disposed by will of the residue of his estate in the following words:—"I will and bequeath . . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

Is that a good charitable bequest? In the Supreme Court of Queensland the Full Court unanimously held that it was. The High Court of Australia, by a majority of three judges to two, declared the bequest void.

The case was argued very ably and concisely on both sides.

The learned counsel for the appellants began by insisting that inasmuch as according to the authorities a gift to a Roman Catholic Archbishop and his successors, without more, would be a good charitable gift, there is to be found in this will an overriding charitable intention sufficient to supply the lack of certainty—if lack of certainty there be—in the declared object of the bequest. Their Lordships have no hesitation in rejecting this argument. A similar argument was advanced and rejected in the Court of Appeal in England in the case of *In re Davidson*. (1) It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee.

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(1) [1899] A. C. 309.

(2) [1908] 1 Ch. 720, 734.

(3) L. R. 12 Eq. 574.

(4) [1896] 2 Ch. 451, 458.

(5) [1909] 1 Ch. 567.

On the other side it was contended that even if the trust declared be a charitable trust the words "wholly or in part" leave it uncertain how much of the subject-matter of the gift is impressed with the trust, because the trustee is authorized to apply part only of the residue to the purpose specified in the will. This argument was not accepted in the Supreme Court of Queensland. But it certainly found favour with some of the learned judges in the High Court. It seems to their Lordships that on the true construction of the will the effect of the words in question is merely to give the trustee a discretionary authority to break in upon the capital of the trust fund. The fund is to be "used"—an expression which seems to imply that the capital is to be kept intact—and (if the trustee thinks fit) "expended in whole or part" in promoting the object of the trust.

Passing from these two points we come to the real difficulty of the case. The fund is to be applied in such manner as the "Archbishop may judge most conducive to the good of religion" in his diocese. It can hardly be disputed that a thing may be "conducive," and in particular circumstances "most conducive," to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the Court attaches to the word, and indeed without being in itself in any sense religious. In *Cocks* v. *Manners* (2) there is the well-known instance of the dedication of a fund to a purpose which a devout Roman Catholic would no doubt consider "conducive to the good of religion," but which is certainly not charitable. In the present case the learned Chief Justice suggests by way of example several modes in which the fund now in question might be employed so as to be conducive to the good of religion though the mode of application in itself might have nothing of a religious character about it. As to what may be considered "most conducive to the

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(1) [1909] 1 Ch. 567.

(2) L. R. 12 Eq. 574.

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good of religion" in the diocese of Brisbane the Archbishop is given an absolute and uncontrolled discretion. That being so, apart from a certain line of decisions cited at the Bar, there would be an end of the case. The language of the bequest (to use Lord Langdale's words) would be "open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution": *Baker* v. *Sutton.* (1) If the property, as Sir William Grant said in *James* v. *Allen* (2), "might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

It was said: This is a gift for religious purposes, and the Court has held over and over again that a gift for religious purposes is a good charitable gift. That is true. But the answer is: This is not in terms a gift for religious purposes, nor are the words synonymous with that expression. Their Lordships agree with the opinion of the Chief Justice that the expression used by this testator is wider and more indefinite. On this part of the case *In re White* (3) was referred to. There the gift was "to the following religious societies, viz.:—" Then there was a blank. The intended societies were not specified. Kekewich J. held that there was an intestacy. The Court of Appeal held that the gift was in substance a gift to "religious societies for religious purposes," and so holding they considered themselves bound by a long stream of authority to determine that the bequest was a good charitable gift. Whether they were right in so construing the unfinished sentence before them may perhaps be doubted, but it is perfectly clear that they did not mean to lay down any new law, or to extend the law as laid down in former decisions. All they did was to hold, as had often been held before, that a bequest for religious purposes was a good charitable gift. It was too late in their opinion to depart from long-established decisions, although the Master of the Rolls did observe that "a religious society may or may not be a charitable society in the sense in which that expression is used."

In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical

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(1) (1836) 1 Keen, 224, 233.
(2) (1817) 3 Mer. 17.
(3) [1893] 2 Ch. 41.

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with the expression "for religious purposes," and therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. But having regard to the great divergence of judicial opinion in this case, and the fact that the difficulty was occasioned by the testator himself, they think that the costs of both parties as between solicitor and client ought to be paid out of the estate.

Solicitors for appellants: *Whites & Co.*
Solicitors for respondent: *Trinder, Capron & Co.*

J. C.*
1912
Jan. 24, 25;
Feb. 21.

[PRIVY COUNCIL.]

SOUTH AFRICAN BREWERIES, LIMITED . DEFENDANTS;

AND

MAYOR AND COUNCILLORS OF THE BOROUGH OF DURBAN . . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Natal Municipal Corporations Act, 1872, *s.* 77—*Contract for Lease—Authority of the Governor—Plea that Contract had been rescinded—Reclamation Works on the Leased Lands—Acquiescence.*

To a suit for rent in respect of lands in Durban contracted to be leased in 1902 to the appellants by the respondent corporation the former pleaded (1.) that the contract was ultra vires of the corporation, by reason that the lease tendered had been granted without the consent of the Governor of the Colony; (2.) that the respondents had broken the contract and so dealt with the leased lands as to terminate the lease and their rights thereunder:—

Held, that under s. 77 of Natal Law 19 of 1872 (Municipal Corporations Act) the Governor's consent was necessary and on the evidence had been validly given.

Reclamation works upon the land leased, conducted for years by the

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

Government under Act 36 of 1904 in agreement with the corporation for the public good and benefit to the knowledge of the appellants, without objection made, do not entitle them to rescind their contract.

J. C.
1912
SOUTH AFRICAN BREWERIES, LIMITED v. DURBAN CORPORATION.

APPEAL by special leave from a judgment of the Supreme Court of Natal (May 5, 1910).

On February 15, 1909, the respondents sued to recover 1545*l.* rent due for lands leased or contracted to be leased in 1902 to the appellants, and 474*l.* 15*s.* 10*d.* rates payable in respect of buildings which had not been erected thereon. The terms of the contract are stated in their Lordships' judgment.

By plea and claim in reconvention the appellants denied that the contracts under which the respondents claimed were binding upon them and sought to set them aside. They were illegal and ultra vires, s. 77 of the Municipal Corporations Law, 1872, not being satisfied. The respondents' acts in 1907 and 1908 terminated the appellants' obligations under the contracts. The sums claimed as rates were in any case irrecoverable and should be paid back so far as they had been paid.

The Supreme Court decreed in favour of the respondents.

Upjohn, K.C., Danckwerts, K.C., and *A. M. Latter,* for the appellants, contended that judgment should have been in favour of the appellants in the action and also on the claim in reconvention. The contracts were ultra vires under s. 77 of the Act of 1872. The evidence shewed that the Lieutenant-Governor's approval to the corporation leasing the lands to the appellants on the terms contained in the building clause had not been obtained. The consent was produced and was silent as to the lessees being required to pay rates in respect of buildings not erected thereon in addition to rates on the value of the land. Reference was made to *Hodgkinson* v. *Crowe* (1); *Ponsonby* v. *Adams* (2); *Rolfe* v. *Peterson* (3), as explained by Sir E. Sugden L.C. in *French* v. *Macale.* (4) In fact no lease had been granted to the appellants, or at all events none legally binding, and no registration so as to make it binding and effective. The acts of the respondents in 1907 and 1908 amounted to a resumption of possession of the lands leased or in the alternative deprived them of any value to the appellants and so terminated their obligations. The appellants required the lands for the erection of a brewery, and their levels having regard to the sea and the railway were important, and also their means of access to the sea. The respondents took possession, and covered them with sand to a depth of more than twelve feet. They thus raised the level above the railway to an extent which the evidence shewed destroyed the facilities for loading, altered the character of the soil and the natural course of the drainage of the lands to the appellants' detriment, and deprived them of access to the sea. The respondents' acts were not authorized by statute, nor covered by the indemnity clause in s. 4 of Act No. 36 of 1904. That Act did not confer on the Government or the respondents any right in the lands leased or contracted to be leased adverse to the appellants. Nor could the agreement scheduled thereto, which was between the Government and the respondents, confer rights against the appellants, who were not parties to it. Neither the Act nor the agreement provided any compensation to the appellants for acts injurious to them, and therefore ought to be construed strictly. The Act on its true construction did not authorize the respondents' acts on lands of which they had sold the lease; nor did the indemnity clause prevent the determination of the lease by their acts. The respondents were not entitled to specific performance of their contract, and the appellants relied upon their breach of it. Reference was made to Fry on Specific Performance, ss. 922, 959, 960, 961; Nathan's Common Law of South Africa, vol. 2, p. 814, par. 913, as to the rights of a lessee; *Walsh* v. *Lonsdale* (1); *Tilley* v. *Thomas* (2); *Lamare* v. *Dixon* (3); *Knatchbull* v. *Grueber* (4); *Bedford and Cambridge Ry. Co.* v. *Stanley* (5); *Royou* v. *Paul* (6); *Logan* v. *Commissioner of Public Works (Cape Colony)* (7); *London and North Western Ry. Co.* v. *Evans* (8); *Woodward* v. *Gyles* (9); *Leigh* v. *Lillie* (10); Van der

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(1) (1874) L. R. 10 Ch. 622.
(2) (1770) 2 Bro. P. C. 431.
(3) (1772) 2 Bro. P. C. 436.
(4) (1842) 2 Dr. & War. 269, at p. 277.

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(1) (1882) 21 Ch. D. 9, 14.

(2) (1867) L. R. 3 Ch. 61.

(3) (1873) L. R. 6 H. L. 410.

(4) (1817) 3 Mer. 124.

(5) (1862) 2 J. & H. 746.

(6) (1858) 28 L. J. 555.

(7) [1903] A. C. 355.

(8) [1893] 1 Ch. 16, 28.

(9) (1690) 2 Vern. 119.

(10) (1860) 30 L. J. (Ex.) 25.

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Linden, Inst. of Holland, bk. 1, c. 15, s. 12, p. 142; Voet, 19, 2, 23 to 36, Berwick's translation, p. 222; *Partridge* v. *Adams* (1); *Fleming* v. *Johnson* (2); *Moosa* v. *Schiele* (3); *Rahim Abdool Rahman* v. *Esop Suliman* (4); *Eberhard* v. *Karras*. (5)

Sir E. Clarke, K.C., and *R. C. Hawkin*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Supreme Court of the Colony of Natal, dated May 5, 1910. The action was brought by the respondents against the appellants, who are a limited company engaged in the business of brewing in Natal and elsewhere, and the respondents' claim is for eighteen months' rent from December 20, 1907, and for additional rent or rates for two years from July 31, 1907, and certain smaller sums, it being admitted by the appellants before their Lordships, as it was in the Courts below, that if the appellants are liable the amounts sued for are correct.

The sums are payable in respect of certain lands contracted to be leased to the appellants by the respondents. These lands are situate in the Congella district of Durban, and the lease of them was advertised to take place on December 20, 1902, by auction. The leases were offered for thirty years, with a perpetual right of renewal. It is not denied that the appellants purchased at the sale, and that the prices and conditions of sale are correctly stated and founded upon by the respondents, unless the objections to the transaction made by the appellants are sound.

It does not appear to be doubted that the prices offered by the brewery company and by other offerers for these plots of ground were high. The period of sale was during what is termed a boom occurring subsequent to the conclusion of the Boer war. The boom has since subsided, and the appellant company, after having paid rent and the rates contracted for for a period of about five years, have put forward a defence to this suit, and a claim in reconvention that the contract is not binding on the breweries,

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(1) (1904) Transvaal S. C. 472.
(2) (1903) Transvaal S. C. 319.
(3) (1905) Transvaal S. C. 616.
(4) (1900) 21 Natal L. R. (N.S.) 133.
(5) (1908) 29 Natal L. R. (N.S.) 505.

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1912

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or that the same may be set aside, and that all the money hitherto paid under the transaction should be repaid.

With the exception of one trifling transaction, which need not be referred to, it may be said generally that the breweries, having purchased at this sale, and having been in possession of the lots, did nothing in the way of building, but left the land bare and waste as they had found it. On the other hand, during the period of about five years referred to, they paid, as stated, the rent stipulated, and they also paid the rates stipulated in the conditions of sale.

At the Bar of this Board the main objections pleaded to the liability of the breweries under the agreement founded upon were, first, that the agreement itself was ultra vires of the corporation, by reason of the lease which was tendered having been granted without the consent of the Governor of the Colony. The second main objection is to the effect that the city of Durban has itself committed a breach of the agreement, and has so dealt with the property which was the subject of lease as to terminate that lease and all its (the city's) rights to rents or other prestations thereunder.

1. The catalogue of the corporation sale is founded upon by the appellants in respect particularly of condition 3, which is to the following effect:—"3. Buildings not less in value than the rental realised at sale capitalised at 4½ per cent. must be erected on each lot within twelve months from date of sale, to the satisfaction of the town council, or failing erection, lessees to pay rates in each and every succeeding year on a sum equivalent in the same way as though the buildings were erected, in addition to the value of the land."

It is admitted by both parties that, under the terms of s. 77 of the Law No. 19 of 1872 (the Municipal Corporations Act), the consent of the Lieutenant-Governor of the Colony was required to the conditions upon which the leases were put up for sale. The exact material words of the section are as follows: "The council may, with the consent of the Lieutenant-Governor, lease any portion of the lands belonging to the corporation for any period not exceeding fifty years, with or without the option of purchase, at such price and upon such conditions as may be approved by the Lieutenant-Governor, and with or without an undertaking to renew such lease, as provided in clauses succeeding." It may be, as the learned judges of the Supreme Court think, that the object of requiring this consent is "to protect the interests of the burgesses by fixing a minimum price and stipulating for adequate conditions, so that the corporation may be prevented from sacrificing its estate." This seems prima facie to be a reasonable view; but, on the other hand, whatever the object be, the provisions laid down by the statute as to consent must be complied with. It is to be observed, however, that the statute nowhere prescribes that the Lieutenant-Governor's consent shall be in writing, and their Lordships think it proper to add that in a case where a bargain has been acted upon for a considerable term of years, and great change of circumstances has in the meantime occurred, any argument going to an attack upon the foundations of the bargain must be examined with the most careful scrutiny, and cannot be lightly entertained.

The argument in the present case is that condition 3 above quoted is essentially two conditions, one providing for the erection of buildings and another for the non-erection of buildings. Their Lordships are disposed to hold that the latter of the alleged separate conditions is simply a proviso affecting the former and containing a stipulation that, in the event of the main condition as to buildings not being complied with, certain penal consequences shall follow. It does not appear to them that, when a body of conditions is presented to the Lieutenant-Governor, and when a general consent thereto is indicated, it is essential that the details of provisoes relative to the conditions should be entered upon his consent. It has been already observed that the consent may be a verbal one. In this case, however, the consent was by letter. The letter is from the Minister of Lands and Works, dated December 19, 1902 (the day before the sale), and supersigned by the Governor:—"I do hereby . . . . give my consent to the leasing by the Town Council of the Borough of Durban for a term of thirty years, with right to renew for twenty-one years, subject to the provisions of section 2 of Law No. 27 of 1884, the following

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lands situate in the said borough, the exact position of which is set forth in the tracing accompanying this consent. Buildings equal to the value of the lands capitalised at 4½ per cent. to be erected within twelve months." It is urged that the proviso as to there being no buildings is not there contained, and therefore that the entire consent is unavailing, that the sale was made without legal consent, and that everything in it and under it is invalid. Their Lordships are not disposed so to construe the document. It is in general terms, it refers to the "leasing by the town council" and to buildings "within twelve months." What is this leasing and this period? It is something which must in all probability have been explained by the previous correspondence, and there seems little doubt that the whole conditions, which were general, which appear to have been in no way secret, but on the contrary publicly and widely known, conditions for the sale on the following day, were sent when the consent was asked. On December 19 the Secretary of Lands and Works wrote to the Mayor of Durban as follows: "I have the honour to forward to your Worship his Excellency's consent to the leasing of the lands situate in the borough of Durban, and which are referred to in your Worship's letter of the 12th ultimo to the Colonial Secretary." The appellants were asked for that letter, and it appears that its terms have not been obtained and that it has not been produced or referred to in the proceedings. A further question was put whether the conditions of sale were not before the Governor as a whole or were not in all probability actually forwarded to him. To these questions no reply could be given, and accordingly the argument is confined to the bare point that in the letter of consent the proviso alluded to is not specifically mentioned. The learned judges of the Supreme Court "have come to the conclusion that this is not a new condition such as would necessarily require the Governor's consent, but that its object and effect is rather to indicate what will be the consequence of neglect to comply with the building clause; in other words, it imposes a penalty in the event of such default." Their Lordships are of the same opinion, and, after the delay already alluded to, they are indisposed to give any effect to what appears in substance to be hypercriticism.

2. A long and elaborate proof was taken upon the allegations that by their action the city of Durban had committed a breach of the agreement, which disentitled them to found upon it. It does not appear to be disputed that the action of the city was not an ultroneous interference with, or interruption of, rights granted by it to its lessee, but followed upon arrangements made on public grounds with the Colonial Government and upon colonial legislation. The Act No. 36 of 1904 is referred to in this connection. That Act confirmed an agreement between the Government and the corporation, the agreement being scheduled. It makes elaborate provisions for the reclamation of land at or about the Bay of Natal or the foreshore thereof, "so that henceforth the Government shall have and enjoy full, free, and absolute right of carrying out such works and operations in, over, and in connection with the said bay and the harbour of Natal as the Government may at any time think fit."

From the plans it appears that the stretches of land referred to include those contained in the lease, and there seems to be no doubt whatever upon the evidence that the land so leased was from its situation and levels subject to flooding and generally in such a condition that the raising of the level would be to the advantage, not only of the community in general, but of the owners. It does not further seem to be doubtful that these operations were undertaken, both upon the part of the Government and the corporation, to use the language of the agreement, "for the public good and benefit," and that from beginning to end they were conducted in the knowledge of the breweries, who were lessees of the ground. It is not indeed surprising that the latter should have consented to the operations, for they had already intimated in writing that their plan of erecting a brewery upon the lands was abandoned, and they were having reclamation works of value executed upon their lands without any cost to themselves the lessees. In general language, it may be said that the level of the lands was raised twelve feet, and their Lordships find themselves in entire agreement with the Supreme Court when it observes: "Reviewing the evidence as a whole, we are inclined to the opinion that, so far as the lots in question are concerned, the reclamation works will prove an advantage rather than the reverse, once the drainage works contemplated by the borough engineer have been carried out."

Further, their Lordships are of opinion that it is not open to a lessee, who has known for years of operations which he alleges constitute a trespass, to make such operations subsequently the ground for an action for rescission of the contract of lease. He may have certain remedies in damages if the circumstances admit and do not bar his claim, but he has not a right to rescission of the contract.

It may, in conclusion, on this head be observed that the reclamation works were in point of fact, and under the statute, executed by the Government of Natal. It is no doubt true that this was done by agreement, and properly so, with the corporation. But the act complained of as grounding a rescission of the lease is the act, not of the lessor, but of the Government of the Colony, and s. 4 of the statute of 1904 specifically provides that no person shall have any "right of action against the corporation or the Government by way of damages or otherwise in respect of the non-exercise or abandonment of the cession to the Government of the rights and privileges referred to in the said clause, or by reason of the sale or transfer to the Government of the lands mentioned in the said agreement, or of the exercise of any of the rights thereby conferred upon the Government." It would rather appear accordingly that any right of action was expressly excluded, and there appears to be no reason why this exclusion should not extend to the present action. But,—whether that be so or not,—for the reasons already given, their Lordships are of opinion that the remedy of rescission and the grounds of breach of agreement by the city put forward by the appellants are invalid.

There were two other grounds upon which the appellants' case was rested, and these were said to be founded upon the Roman-Dutch law. The first, as to there being no registration of the lease, and that the transaction was therefore void, was not argued; and the second,—that the contract was voidable because in the circumstances there was laesio enormis under the Roman-Dutch law,—was not seriously entered upon. Their Lordships are not surprised that this judicious course was taken on both points.

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The case of the appellants, in which every point of criticism was seized, appears in substance simply to be the ordinary case of a purchaser who has bought in a high market, the transaction being in all respects open and fair, and who endeavours to get rid of a bargain so made when he has changed his view as to the suitability of his purchase or finds himself in a sagging market.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Loughborough, Gedge, Nisbet & Drew.*

Solicitors for respondents: *Ashurst Morris, Crisp & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
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RUSSELL . . . . APPELLANT;

AND

AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS AND OTHERS . . . RESPONDENTS.

Trade Union—Restraint of Trade—Legality of Association at Common Law—Legal and Illegal Purposes—Severability—Action to enforce Payment of Benefits to Member—Jurisdiction—Trade Union Act, 1871 (34 & 35 *Vict.* c. 31), *ss.* 3, 4.

The rules of a society registered under the Trade Union Acts, 1871 and 1876, combined provisions for the militant purposes of a trade union, which were admittedly in restraint of trade, with provisions for the provident purposes of a friendly society, and the subscriptions of the members were applicable to all the purposes of the society. One of the rules provided for the expulsion of members for non-compliance with the decisions of the managing or branch committees directing the militant operations of the society or for violating the recognized trade rules of the district:—

Held, that an action against the society and its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefit was not maintainable under the Act of 1871, and was not maintainable apart from the Act; by Earl Loreburn L.C. and Lord Atkinson, because the society, being a voluntary association, could not have been sued in such an action in its own name; by Lord Macnaghten, Lord Shaw of Dunfermline, Lord Mersey, and Lord

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* *Present:* Earl Loreburn L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline, Lord Mersey, and Lord Robson.

Robson, because the society was an illegal association at common law, inasmuch as its main purposes were in unreasonable restraint of trade and the rules relating to those purposes were not severable from the rules relating to its provident purposes.

Decision of the Court of Appeal [1910] 1 K. B. 506, affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Phillimore J. (1)

The appellant was the widow and personal representative of James Russell, deceased, a carpenter, who was for upwards of forty years a member of the respondent society. The respondent society was a trade union registered under the Trade Union Acts, 1871 and 1876; the other respondents were the trustees of the society.

The appellant brought an action against the respondent society and its trustees, who were sued "as trustees and representatives of the said society," for payment of certain moneys representing superannuation benefit to which she alleged the deceased was entitled under the rules of the society at the time of his death. The respondents by their defence alleged (inter alia) that the Court had no jurisdiction to entertain the action by reason of the provisions of the Trade Union Acts, 1871 and 1876, and that if there were any contracts subsisting between the deceased and the respondents at the time of his decease (which they denied) the same were in restraint of trade and unenforceable at law.

An order was made by a Master that the points of law raised by the defence should be disposed of before the trial of the action.

The rules of the respondent society, so far as material, were as follows:—

The objects of the society were by rule 1, clause 2, declared to be "to raise funds for the advancement, protection and organisation of the trade; to render legal assistance to members for the recovery of wages; for the mutual support of its members in cases of sickness, accident and superannuation; for the burial of members and their wives; for loss of tools by fire, water or theft; for assistance to members out of work and to assist (to a reasonable extent) any branch or district desirous of joining with other branches of trade with which our members are identified, either in the ship or house building industries, with a view to advancing the general conditions of labour; also as directed in the following rules to form a contingent fund, which shall be used for the purpose of granting assistance in cases of distress not otherwise provided for by these rules; to aid our own or any other organized trade; to take legal proceedings under the Employers' Liability Act, and Workmen's Compensation Act, on behalf of members who may have been injured, or met their death by accident in the United Kingdom."

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(1) [1910] 1 K. B. 506.

By clause 3 of the same rule the society was to be divided into branches, each branch to appoint its own officers and conduct its own business.

Rule 4: "It shall be competent for any branch where no managing committee exists at a special or quarterly meeting to fine (the amount not to exceed 2*l.*), suspend or expel any member from the society, upon satisfactory proof being given that such member has acted contrary to the provisions of rule 48, clause 1."

Rule 8, clause 1: "Members of this society shall be entitled to all benefits by paying 1*d.* per week contribution, 4*d.* per quarter to the contingent fund, and 6*d.* per year to the special fund for trade movements."

Clause 8: "All moneys subscribed by the members of this society shall be the property of the society generally, and not of the branches to which the members respectively belong, and shall be held for and devoted to the payments of the benefits specified in these rules; and any branch leaving the society shall forfeit all the money it has accumulated."

Rule 9, clause 5: "In the event of any great struggle between capital and labour in our own or any other trade, with no immediate prospect of a settlement, the executive council shall when requested by ten branches outside the area affected, at once, take a vote of the whole of the members in the United Kingdom on the question of a levy (which must not exceed 3*d.* per week per member) for the purpose of supplying the men affected with pecuniary support at the earliest opportunity."

Rule 11 was headed "Election of Officers for the Management of Trade Movements." By clause 1, "Whenever it may be decided by the majority present at a summoned meeting of the members of the society in any locality that a change in the existing code of working rules or in the trade regulations and customs of the district is desirable, or for the better carrying out of the local working rules and customs of the trade, a committee for the management of the movement, to be called the 'managing committee,' may be appointed by the aforesaid summoned meeting such committee to remain in office twelve months"; and by clause 6, "In all towns or districts where more than one Carpenters and Joiners Society is established a 'united trade committee' may be formed composed of representatives of the various societies."

Rule 27 was headed "Duties and Powers of Officers conducting Trade Movements, Managing or United Trade Committees." Clause 1 provided that "Whenever notice has been given to or received from the employers proposing an alteration of working rules the managing committee or united trade committee shall have power to suspend the working of overtime in the district until a settlement has been arrived at. They shall undertake the general management of the movement and shall endeavour, if possible, to obtain an amicable settlement, and shall have power to fine (the amount not to exceed 2*l.*), suspend, or expel any member who has refused to comply with the committee's decision, or has violated any of the conditions laid down in rule 48, clause 1. This power shall not apply to united trade committees but shall be vested in the members of this society connected with united trade committees, who may form themselves (if necessary) into a managing committee for the purpose of conducting matters relating to our society only."

Rule 36 was headed "Trade Privileges." Clause 2 fixed the amounts allowed to members leaving their employment under circumstances satisfactory to the branch, branch committee, managing committee, district committee, or executive council. Clause 3 provided that "In any town or district where the managing committee, united trade committee, branch committee, or a summoned meeting of the branch consider it to their best interest that our members should refuse to work with non-union men they shall be entitled to trade privileges." Clause 6, provided that "Any member or members who may be withdrawn from their employment on the instruction of the managing committee, united trade committee, branch committee or branch shall be entitled to trade privileges for any period not exceeding six weeks."

Then followed a series of rules (37—43) which provided for various payments to members in the nature of friendly society benefits—"unemployed benefit," "tool benefit," "sick benefit," "accident benefit," "superannuation benefit," and "funeral benefit."

Rule 48 was headed "Misconduct of Members." Clause 1 provided as follows: "It shall be competent for any managing committee, branch committee, or branch at a special or quarterly meeting, to fine (the amount not to exceed 2*l.*), suspend, or expel any member from the society upon satisfactory proof being given that such member has refused to comply with their decision, or by his conduct brought the society into discredit, wilfully violated the recognised trade rules of the district in which he is working, taking [*sic*] a sub-contract or piecework, or working for either of these classes of employers (sub-contractor or pieceworker being defined as a person taking the labour of a job only, and not supplying the material), or fixing, using, or finishing work which has been made under unfair conditions, either in the United Kingdom or abroad, or contrary to the recognised trade rules of the district in which it has been prepared, or has fraudulently received or misapplied the funds of the society, or the moneys of any member or candidate entrusted to him for payment to the society; or belonging to any labour bureau or similar institution, or holding any official capacity in the same. (This condition shall not apply to the Labour Department of the Board of Trade or a similar department in the United States or the Colonies.)"

Phillimore J. held that the Court had no jurisdiction to entertain the action and ordered judgment to be entered for the defendants, the respondents, and his judgment was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.).

1911. Oct. 26, 27. *Chalmers-Hunt* and *C. P. Hawkes*, for the appellant. Although some of the purposes of this society are in restraint of trade, the rules relating to the different purposes of the society are severable and the rules with regard to friendly society purposes could be sued on at common law, apart from the Trade Union Act, 1871. The view of the Court of Appeal was that the rules sued on, though admittedly innocent in themselves, were tainted by illegality by reason of the other rules of the society, but that decision was based upon a misapprehension with regard to the law as it stood previously to the passing of the Act of 1871. There is no illegality in the suggestion of restraint of trade; the only result is to render a contract made in restraint of trade not binding on an unwilling party. Sect. 3 of the Trade Union Act, 1871, has merely a declaratory and not an alterative effect, and it was inserted to remove a popular misconception as to the law relating to trade unions. In 1825 there was passed an Act, 6 Geo. 4, c. 129, which swept away the laws relating to the combination of workmen, and the effect of that Act was impliedly to legalize trade unions, or at any rate such a trade union as the present, which is not disentitled to a certificate of registration under s. 6 of the Act of 1871. 6 Geo. 4, c. 129, was repealed by 34 & 35 Vict. c. 32, s. 7, an Act passed on the same day as the Trade Union Act, 1871, but the effect of the Act of George IV. was kept alive, not only, it is submitted, by the Trade Union Act itself, but also by the proviso in the repealing section. 34 & 35 Vict. c. 32 was in turn repealed by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 17, subject to a similar proviso, and s. 17 was repealed by the Statute Law Revision Act, 1883, again subject to a similar proviso.

The result is that the effect of the Act of 1825 is still preserved. Apart, therefore, from the Trade Union Act, 1871, the purposes of a society of this kind, even though they are in unreasonable restraint of trade, are not illegal but merely unenforceable, and consequently the rules relating to friendly society purposes are severable from the rules relating to restraint of trade, for the question of divisibility depends on the distinction whether part of the consideration for the contract of association is a nullity or is illegal. This case is governed by the principle of *Chesman* v.

Nainby (1), where a defence substantially identical with the defence in this case was held to be bad in law.

[EARL LOREBURN L.C. Assuming that a trade union was not an unlawful combination before the Act of 1871, still could it be sued in its own name, being a voluntary association? Then the Act of 1871 conferred upon it a status which enabled it to be sued, but then comes s. 4, which places restrictions upon that right of action.]

Counsel also referred to *McAllen* v. *Churchill* (2); *Mallan* v. *May* (3); *Green* v. *Price* (4); *Hilton* v. *Eckersley* (5); *Hill* v. *Levey*. (6)

Sir Robert Finlay, K.C. (*Clement Edwards* with him), for the respondents. The view of the case put forward on behalf of the appellant is unsound and is contrary to authority. *Yorkshire Miners' Association* v. *Howden* (7), as was held by the majority, was not an action for directly enforcing an agreement for the application of the funds of the society to provide benefits to members within s. 4 of the Trade Union Act, 1871, but all the learned Lords assumed that, if it was, the action could not have been maintained. See the judgments of Lord Macnaghten, Lord Davey, and Lord James of Hereford. (8) That section proceeded on the principle that the Legislature did not intend to give to the Court in dealing with associations of this kind the right to interfere in their internal management, and provided that nothing in the Act should enable the Court to entertain an action directly to enforce agreements for the payment of contributions by members or for the giving of benefits to members. Apart from any difficulty as to the form of the action by reason of the union being a voluntary association, this action could not have been brought before the passing of the Act because this was an association for illegal purposes, and if any part of the consideration is illegal the promise cannot be enforced: *Collins* v. *Blantern*. (9) It is admitted that a large portion of these rules is obnoxious to the principles with regard to restraint of trade, and the view that this contract of association was nevertheless not illegal apart from the Act cannot be maintained. The main purpose of this society was illegal as being against public policy: see per Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne.* (1) Whether prior to the Act of 1871 the members of an association of this kind could have been indicted for conspiracy was a grave question. That is dealt with by s. 2 of the Act, which says that they shall not be liable to criminal proceedings by reason merely that the purposes of the association are in restraint of trade. Then s. 3 deals with the civil rights of trade unions, and s. 4 provides, in effect, that the contracts of trade unions shall not be enforceable by action under the Act when they relate to the internal management of the association. Before that Act no action could have been brought by or against a trade union to enforce either subscriptions or benefits: *Hilton* v. *Eckersley.* (2) The question is concluded by *Yorkshire Miners' Association* v. *Howden.* (3)

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(1) (1727) 2 Str. 739.

(2) (1826) 11 Moo. 483.

(3) (1843) 11 M. & W. 653.

(4) (1845) 13 M. & W. 695; (1847) 16 M. & W. 346.

(5) (1856) 6 E. & B. 47.

(6) (1858) 3 H. & N. 702.

(7) [1905] A. C. 256.

(8) [1905] A. C. at pp. 263, 267, 275.

(9) (1767) 2 Wils. 341; 1 Sm. L. C. (11th ed.), 369, at pp. 386, 387.

Chalmers-Hunt replied.

The House took time for consideration.

1912. Feb. 26. EARL LOREBURN L.C. My Lords, this is in effect a demurrer, and we know nothing of the real merits of the dispute. All we have to settle is the law arising upon the pleading.

The question argued before Phillimore J. has not been raised either in the Court of Appeal or in this House. And the question argued and decided in the Court of Appeal is not that upon which I think that the case should now be determined. It was held in the Court of Appeal that some of the rules are illegal, being in restraint of trade in the sense that they are oppressive and against public policy, and that they are so associated with the rules upon which this action is founded as to make the latter unenforceable. I should desire this point to be argued before

(1) [1910] A. C. 87, at p. 95.

(2) 6 E. & B. 47, at pp. 64, 76.

(3) [1905] A. C. 256.

expressing my opinion upon it, but I do not think it necessary to enter upon it at all for the decision of this case. It is undesirable to decide such a point in this case, where counsel upon both sides unite in condemnation of the rules and in an adverse interpretation of their effect. Counsel on both sides laboured to shew that the rules were oppressively in restraint of trade and that therefore the action would not lie.

I am of opinion that this appeal should be dismissed for the following reason: The action is against a trade union directly to enforce or recover damages for breach of an agreement to provide benefits for members.

Lord Macnaghten. My Lords, the defendants are a registered trade union and certain officers of the union. The plaintiff is the widow of a deceased member of the society. As representative of her late husband, she claims a sum of money to which he appears to have been entitled at the time of his death under the terms and conditions of the society's agreement with him as contained in its certified rules. The defence, and the only defence we have to consider, at this stage of the proceedings is that the society was, and is, at common law an unlawful association by reason of its purposes being in restraint of trade, and that although those purposes are, according to the Trade Union Act, 1871, not unlawful so as to avoid the agreement and trust, in respect of which she is now suing, the Court is prohibited or prevented, by s. 4 of the Act, from entertaining her application.

If the defendants can make good the position on which their defence is founded they are undoubtedly entitled to the protection of the statute, and so the action must fail.

A trade union is merely an unincorporated society of individuals. The designation does not of itself import illegality. There have been many and probably there may be still some trade unions lawful in every point of view, and not depending for their legality or for their immunity on the Act of 1871. This proposition is recognized plainly in the definition of a trade union contained in the Act of 1876.

In the case of a trade union not dependent on the Trade Union Acts for its legality or immunity the law is open to the members of the society just as it is in the case of other voluntary societies for the purpose of enforcing contractual rights and trusts against the association.

The only question, therefore, seems to be this: Is this trade union, apart from the Act of 1871, a lawful association? The answer must depend on a consideration of its purposes as manifested in its rules.

It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful. And I cannot help agreeing with the learned judges of the Court of Appeal that such is the character of some of the rules of this society, and further, that having regard to the constitution of the society, the powers vested in its executive officers, and the blending of its funds for all purposes, it is impossible to separate what is legal from what is not legal.

I am, therefore, of opinion that the appeal fails and must be dismissed with costs.

Lord Mersey desires me to say that he has read this judgment and entirely agrees in it.

LORD ATKINSON. My Lords, the trade union in this case is sued in its registered name. It is true that in the *Taff Vale Case* (1) it was held that a trade union might be sued in its trade name for wrongs committed by its agents; but when the judgments delivered in that case are examined, and especially the judgment of Farwell J., which was unanimously approved of and adopted, it will be seen that that decision was based entirely upon the provisions of the Trade Union Act of 1871 as amended by the Act of 1876. The conclusion which, it appears to me, must necessarily be drawn from these judgments is this, that if the Act of 1871 had contained a provision to the effect that nothing in it should enable any Court to entertain any legal proceedings founded upon any tort committed by a trade union through its agents, the decision of this House in the *Taff Vale Case* (1) would have been precisely the opposite of what it was, and that it would have been held that the trade union could not in that case have been sued eo nomine. But the provisions of s. 4, as regards the present action, are in effect similar to the hypothetical provisions above mentioned in their relation to such torts. All the reasoning based upon those provisions of the Act of 1871 upon which the judgments in the *Taff Vale Case* (1) were founded is therefore inapplicable to this action.

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(1) [1901] A. C. 426.

This is an action based upon an agreement " to provide benefits to members " and is instituted directly to enforce that agreement or to recover damages for the breach of it. The statute gives no support to such an action. Whether it can be instituted in its present form or not must depend upon the common law. It is not a representative action such as is frequently instituted in a Court of Equity. It is a common law action, and I am clearly of opinion that the defendant society cannot be sued in such an action in its registered name; nor can the trustees be sued in it in their character of trustees. Partners may no doubt be sued in the name of their firm, but that is under legislation in the form of the Rules and Orders of 1883.

For these reasons I think the action must fail. I do not think the cases of *Simpson* v. *Westminster Palace Co.* (2) and *Russell* v. *Wakefield Waterworks Co.* (3) apply on this point.

This is no doubt a somewhat technical point, but I fully concur with the Lord Chancellor in thinking that it is most undesirable, having regard to the way in which the case was presented by counsel to your Lordships, to decide the important issues raised, as I understand, for the first time in the Court of Appeal. I accordingly express no opinion upon them. The appeal should, I think, be dismissed with costs, but I base my judgment on the point I have already indicated.

LORD SHAW OF DUNFERMLINE. My Lords, this is an action by the widow of James Russell, a former member of the Amalgamated Society of Carpenters and Joiners. This society is a duly registered trade union. Russell had been a full member, having regularly paid his contributions, for about forty years. In the later years of his life he fell into ill-health and was paid sick benefits until his removal by the guardians of the poor to St. Pancras infirmary and thence to a lunatic asylum. He remained in the latter confinement until his death.

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(1) [1901] A. C. 426.
(2) (1860) 8 H. L. C. 712.
(3) (1875) L. R. 20 Eq. 474, at p. 481.

The object of the action is to obtain payment of "a sum of money representing accumulated superannuation benefit" alleged to be due to Russell during the period of his incapacity. There are other conclusions in the claim; for declarations, an injunction, and alternatives; but these need not be referred to; they do not add to or in substance vary what is the real object of the action as above described, except the alternative for repayment of all Russell's contributions to the society during his lifetime. They were not alluded to in argument and are met by the same defence.

The main defence is that a Court of law has no jurisdiction to entertain the claims, by reason of the provisions of the Trade Union Acts of 1871 and 1876. The reference is substantially to the 4th section of the statute of 1871, under which it is provided that " nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" . . . . "any agreement for the application of the funds of a trade union,—(*a*) to provide benefits to members." Neither party has entered upon the question whether the points in dispute are excluded from determination by a Court of law in consequence of their having been contractually remitted for final settlement within the association and by its officers. But both parties have apparently determined to base their case on the other and broader ground, namely, of what their rights are under common law and statute.

My Lords, by s. 3 of the Act of 1871 "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or avoidable any agreement or trust." Were it not for the elaboration of the appellant's pleading it would need no saying that if the purposes of this association be in restraint of trade the union is treated by the statute as one which would be unlawful at common law. Then the Act (s. 3) steps in to declare that they shall not for that reason be unlawful, but (s. 4) that nothing in the Act shall enable a Court of law to entertain legal proceedings to enforce the agreements which it cites. Quoad these, things remain as they were. That is to say, if the association be illegal on account of its purposes being in restraint of trade, it remains the case, just as it was before, that the law cannot be invoked to support it, to regulate it, or to control it, in the particular matters set out in s. 4 of the Act—these matters including the present claim. Accordingly the argument stated to the House was very simple, namely, if the association's purposes were in restraint of trade, then the action is excluded by the statute, just as, but for the statute, it would have been excluded by the common law. The whole of this argument appears to me to be unassailable.

So that the real question would appear to be one determinable by a survey and construction of the rules of this society, namely, whether under these rules its purposes are in restraint of trade. This is how the case was treated, and, in my humble opinion, most appropriately treated, in the Court of Appeal.

Upon this question I regret that we were not favoured with two sides of an argument. Both sides of the Bar concurred in presenting one side of the case, and both agreed in expounding their views upon the footing that some of these rules were in restraint of trade. Such a state of the discussion causes a certain uneasiness as to whether all the materials for determination have been made fully available.

The learned judges of the Court of Appeal have made, if I may presume to say so, a most careful analysis of these rules. In view of the importance of the question and out of respect to these learned judges I have thought it right to make an independent examination of the rules on my own behalf. Having done so, I cannot say that I am free to express any surprise that the counsel for the association should have frankly admitted that they were in restraint of trade, and should upon that have grounded his argument for the exclusion of this action from the cognizance or determination of a Court of law. They contain careful provisions for the internal government of the society, and there is conferred upon the managing committee, the united trade committee, and the branch committees, powers of command, control, and government which are of the most far-reaching and effective character. Under rule 36, where they, at a summoned meeting of the branch, consider it to their best interest that members should refuse to work with non-union men, they—the members —" shall be entitled to trade privileges." The meaning of that, as interpreted by other sections of the rule, is that, for instance, where members have been six months in the society and leave their employment " under circumstances satisfactory to the branch, branch committee, managing committee," &c., they shall be entitled to the sum of fifteen shillings a week; and, under a further section of the same rule, provision is made for the case of " any member or members who may be withdrawn from their employment on the instruction of the managing committee, united trade committee, or branch committee."

Under various rules provision is made for expulsion from the society, and a frequent reference is made to rule 48—rule 4, for instance, providing for fine, suspension, or expulsion, " upon satisfactory proof being given that such member has acted contrary to the provisions of rule 48, clause 1 "; and by rule 27, which affects the duties and powers of officers conducting trade movements, power is given to those committees to fine, suspend, or expel any member who has refused to comply with the committee's decision, or has violated any of the conditions of the same rule, namely, rule 48.

The last-mentioned rule itself provides in most comprehensive terms for fine, suspension, or expulsion of any member upon satisfactory proof being given that such member has refused to comply with the decision of a managing committee, branch committee, or branch. Under the organization, accordingly, it is apparent that the workman, considered as a free disposer of his own labour, is thus confronted with a situation of great seriousness should his freedom conflict with the decisions of any of the committees referred to. He is further exposed to liability to fine, suspension, and expulsion if he has " wilfully violated the recognised trade rules of the district in which he is working " or takes " a sub-contract or piecework " or is working for these classes of employers, or fixing, using, or finishing work made under unfair conditions either at home or abroad, the judgment upon this subject being apparently the judgment of the governing bodies referred to. So far as the individual liberty of the worker is concerned, it is accordingly fairly plain that trade in respect of him is restrained, but that would not be sufficient to satisfy the conditions of unlawfulness unless these were also such as to affect trade in general or the public at large. Upon this subject it, however, appears that provisions are made for granting assistance to other trades and for levies of threepence per week per member "in the event of any great struggle between capital and labour in our own or any other trade."

My Lords, I have only indicated these points from the rules for the purpose of saying that the course adopted by the counsel for the association was the perfectly natural and proper course of a frank admission that these rules are, in fact, in restraint of trade. They mean, and appear, to provide the materials and machinery under which, according to the decision and at the direction of the officials of the association, a particular trade may not merely be restrained, but, by concerted action with other branches of industry, that trade and the trade of the country at large may be actually paralysed.

The contest in argument, however, as I understood it, was that while some of the rules might be and were in restraint of trade, these were separable from the others, all of which were legitimate, and that the objects of the association were, on a correct survey of the rules as a whole, not tainted by unlawfulness. It must stand admitted that many of the association's objects are of a purely friendly society character, and that the highly valued provisions for sick, unemployed, accident, superannuation, and funeral benefits are familiar and entirely within the law. Nor can it be denied in the general case that the occurrence here and there of certain passages in the rules of such societies which would point to action outside of the law may not be of itself sufficient, so to speak, to taint the objects of the society as a whole. Further, the reference to the occurrence of strikes in the rules or the provision for the support of members during a strike does not per se make the association illegal.

Strikes may be perfectly legal or they may be illegal. It depends on the nature and mode of the concerted cessation of labour. If this concerted cessation is in breach of contract, then it could not be said to be within the law any more than could a breach of contract by a single workman. If, on the other hand, a strike be a cessation of labour on the expiry of contract, there is no necessary illegality there, any more than in the case of an individual workman completing his current bargain and then choosing to remain idle. But, of course, in this latter case, the concert for the cessation of labour may be for the sole or deliberate or obvious purpose of restraining trade, in which case different legal consequences might ensue, and to this I have referred. All of these principles (excluding the exceptional case last mentioned) are now well settled by authority; and they are no longer questioned.

But, my Lords, the two outstanding obstacles to the separability of the objects of this society appear to be those of finance upon the one hand, and of coercive discipline and expulsion upon the other.

The massing of funds has been considered by trade unions to be of vital importance, to conduce to their effectiveness in action and to be justified by sound general policy. Such massing occurs here, and the segregation of funds into those for the promotion of objects which, upon the one hand, are within and, on the other, outside of the law, is thereby prevented. But, my Lords, in the next place, the power of fine, suspension, and expulsion from the society is of a character so effective and drastic as to take no stock of distinctions between one object of the society and another, and to have a cumulative and complete effect with regard to the contributions of the member as a whole. If expulsion takes place by reason of a workman pursuing his avocations alongside of a non-union member, it is equally effective with expulsion which takes place by reason of his having failed for a stipulated period to make his contributions to the society; or if again the judgment of the individual workman, or even a body of workmen, should differ from the decision of the committee with reference to a dispute in another industry with which it is averred that his own trade has not sympathy or is not concerned, then equally he forfeits by expulsion all his contributions made to the society, including the provisions for sickness, accident, or unemployment, for which the rules provide.

Lord Shaw of Dunfermline.

My Lords, in these circumstances, and upon the construction of the rules as they have been presented, I cannot see my way to give effect to the separability claimed. I think upon this point that the arguments presented on behalf of the society are also sound, and that its objects, thus taken together and as a whole, stand open to the objection of being in restraint of trade, and to the plea founded thereon.

I am of opinion that that plea should be sustained and that this appeal fails.

Lord Robson. My Lords, the argument in support of the plaintiff's claim appears to have been based on different grounds in the various tribunals to which it has been submitted, and there is still some obscurity as to what precisely are the propositions of law which the plaintiff's counsel invite your Lordships to affirm. Before Phillimore J. his main contention was that although the plaintiff's deceased husband could not have maintained this claim, yet she, as his nominee or representative under s. 10 of the Trade Union Act Amendment Act, 1876, and s. 7 of the Provident Nominations and Small Intestacies Act, 1883, was entitled to do so. That hopeless contention was not raised in the Court of Appeal. There the plaintiff's counsel is reported (1) as contending that "the first question is whether the objects of this society are so in restraint of trade as to be illegal at common law and to so affect the rules of the society as a whole that they are not capable of being severed for the purpose of enforcement in a Court of law."

Before your Lordships the plaintiff's counsel went a little further and admitted explicitly that at least one important rule (No. 48) was in unreasonable restraint of trade. He could scarcely do otherwise. His argument was then narrowed to the point that though some of the objects of the society were illegal, yet they were distinct and severable from the other objects, such as sickness and superannuation benefits, and that, so far as the contract between the plaintiff's deceased husband and the society related to those latter objects only, it was enforceable at law. The plaintiff could, of course, get no help from the trade union statutes, for while, on the one hand, modifying the doctrine of restraint of trade in favour of trade unions, those statutes are careful, on the other hand, to enact that their provisions shall not be used in the enforcement of contracts between trade unions and their members like that now in question.

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(1) [1910] 1 K. B. at p. 512.

A further question has arisen, or was incidentally mentioned during the course of the arguments before your Lordships, as to whether the action has been properly framed. The plaintiff has sued the defendant society in its registered name together with its trustees, who are sued as "trustees and representatives of the said society." It does not appear whether the trustees are, or are not, "representative" of the society in the sense that would make them proper to be defendants in a representative action. We do not know whether they are even members of the society or not, and I think it must be taken that the action as framed is bad, unless it can be shewn that such an action may be properly brought against an association like the defendant society in its registered name. That point was discussed in the *Taff Vale Case* (1), where it was decided by your Lordships' House that the action, which was one of tort, was properly brought against the trade union in its registered name. But the ground of that decision, as stated by Farwell J. in the Court of first instance, and by some of your Lordships on appeal, was that the trade union had been made liable to such an action by the operation of the Trade Union Act, 1871, which admittedly excludes from its scope a contract of the kind now sued on. Lord Macnaghten adopted a broader ground, and thought that a trade union might be sued in its own name, apart altogether from the Trade Union Acts. Lord Lindley appears to have agreed with him, though he was content to affirm the liability of the union to be sued apart from the Act, in a representative action; while the other noble and learned Lords at least said nothing directly inconsistent with Lord Macnaghten's view. No objection, however, was taken to the form of the present action by the defendants' counsel, so the point has not been argued before your Lordships, and, as there may be some doubt about it, perhaps it is desirable that we should deal with the substance of the case.

(1) [1901] A. C. 426.

Lord Robson.

The first question that arises is whether the agreement between the defendants and the plaintiff's husband, as embodied in the rules of the defendant society, is in contravention of the common law doctrine as to unlawful restraint of trade. If so, then the agreement is void, unless what is legal in it can be treated as wholly independent of its illegal objects. For the purpose of dealing with this question it is enough to refer to rule 48. That rule constrains a member by fine, or suspension and threat of expulsion, to comply with the decision of the executive committee as to strikes and to obey the recognized trade union rules of the district, whatever they may be, as to the conditions of his work. It also prohibits him from "taking a sub-contract or piecework, or working for either of these classes of employers (sub-contractor or pieceworker being defined as a person taking the labour of a job only and not supplying the material), or fixing, using, or finishing work which has been made under unfair conditions, either in the United Kingdom or abroad, or contrary to the recognised trade rules of the district in which it has been prepared." There can be no doubt that prior to the Trade Union Act, 1871, provisions of this sort were held to be in restraint of trade. The cases of *Hilton* v. *Eckersley* (1) and *Hornby* v. *Close* (2), without mentioning others to the same effect, are conclusive in support of that proposition.

Indeed, had the law been otherwise, the Trade Union Act, 1871, would have been unnecessary. It was passed after the two decisions I have mentioned. *Hilton* v. *Eckersley* (1) was decided in 1856 in reference to a trade combination of employers. The facts in that case were that certain millowners in Lancashire had bound themselves "to carry on or wholly or partially to suspend the carrying on, of their works in conformity with the will of the majority . . . . present at a meeting." This was held to be in restraint of trade, because, in the language of Alderson B., who delivered the judgment of the Exchequer Chamber, "the bond was framed to enforce a contract by which the obligors agree to carry on their trade, not freely as they ought to do, but in conformity to the will of others; and this not being for a good consideration, is contrary to the public policy."

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(1) 6 E. & B. 47.

(2) (1867) L. R. 2 Q. B. 153.

Hornby v. *Close* (1) was decided in 1867, and applied the same principle to similar contracts between workmen. These decisions have never, so far as I know, been disapproved or doubted by the Courts, and they may be said, indeed, to have been acted on by the Legislature, for it is obvious that the Trade Union Act of 1871 was passed in order to protect trade unions from some of the consequences of the law as declared in those and similar cases. It is, therefore, rather late in the day to contest their authority.

The primary object of the Act of 1871 was to safeguard the right of industrial combination, whether for the purpose of improving the wages and conditions of labour or of increasing the profits of capital. It was framed explicitly on the assumption that, as the law then stood, trade unions were very generally (though perhaps not universally) acting in restraint of trade. This is clear from the definition clause of the Act itself. The term "trade union" is there declared to mean "such combination for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

This definition gave rise to the anomalous situation that, before a trade union could take advantage of the benefits of the Act with regard to registration, &c., it had to prove that its rules were in restraint of trade, for it was only to such combinations that the Act applied. This was remedied by the amending Act passed in 1876, whereby the definition was made to include trade unions whether they were in restraint of trade or not, but this amendment does not substantially detract from the force of the foregoing observations as to the assumed state of the law prior to the passing of the principal Act.

It is to be observed that the Act did not go the length of abrogating or altering the general law against restraint of trade. It grafted an exception on it in favour of certain classes of persons, but by s. 4 it maintained the principle of the old law, even against those persons, to the extent of refusing the assistance of the Courts in the direct enforcement of contracts between members of a trade union, when the purposes of the union were in restraint of trade. Had it gone further and altogether excluded the application of the common law doctrine in this connection, the Courts would have been compelled to give full effect by decree, or injunction, to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their immediate necessities might be. Such contracts would then be as legal as any other by which a man limits his freedom of action for a definite time or purpose, and the prospect of the burden which would thus be cast upon the executive, of actively enforcing great numbers of such contracts in periods of industrial hardship or disturbance, was one from which Parliament might well shrink.

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(1) L. R. 2 Q. B. 153.

But the operation of s. 4 of the Act of 1871 is not confined merely to contracts in restraint of trade. It enacts also " that nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of (inter alia) (3.) Any agreement for the application of the funds of a trade union,—(*a*) to provide benefits to members."

Prima facie, the agreements thus excluded from the benefits of the Act are legal and meritorious, and their exclusion can only be due to the fact that they rest, in some degree, upon a consideration involving a restraint of trade which the law tolerates but will not directly assist. This circumstance has a significant and important bearing on the plaintiff's contention that claims for sickness and superannuation benefits are unaffected by the character of the general purposes of the union, because those benefits are separable from the rest of the agreement and rest upon an independent consideration. That was not the view of the framers of the statute. They put trade union agreements for what one may call friendly society benefits on the same footing as any other trade union agreements which were in restraint of trade. The reasons for this are obvious. Trade unions generally (including this defendant society) make no separation or distinction of funds between the two classes of benefit. The contributions which a member has to make under rule 8 of the defendant society cover all benefits. There is nothing to shew what proportion should be, or in fact is, allocated to sickness and superannuation benefits, and how much to what one may call the militant purposes of the society. In face of the rules it could not be suggested that the defendant society would or could, in the course of its ordinary working, allow such a severance of the different parts of the agreement as is here demanded. The solidarity of its objects is shewn by the fact that under rule 48 a member who commits a breach of the trade regulations of the society, or refuses to comply with any decision of the executive committee, however much it is in restraint of trade, may be expelled and thereby forfeit the sickness and superannuation benefits to which he may have contributed for a lifetime. Obedience to the provisions of this rule, which is admittedly obnoxious to the common law doctrine as to restraint of trade, is therefore, in the case of this union, an essential part of the consideration for sickness and superannuation benefits, and the contention that those benefits rest upon a distinct and severable part of the consideration for the whole agreement cannot be sustained. I am, therefore, of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Lords' Journals, February 26, 1912.

Solicitor for appellant: *O. C. Kent.*
Solicitors for respondents: *Corbin, Greener & Cook.*

[HOUSE OF LORDS.]

H. L. (E.)*

1912

March 7.

SUN INSURANCE OFFICE . . . . APPELLANTS;

AND

CLARK . . . . RESPONDENT.

Revenue—Income Tax—Fire Insurance Company—Profits or Gains—Premium Receipts—Deductions for Unexpired Risks.

There is no rule of law that in assessing a fire insurance company to income tax the total premium receipts for the year, after deducting the losses and disbursements for the same period, are to be taken as the profits of the company, without making any allowance for unexpired risks on policies outstanding at the end of the year; but where it becomes necessary to have recourse to some form of estimate, that method will be adopted which approximates most nearly to the truth.

Where, therefore, it was proved, on an appeal by a fire insurance company against an assessment, that it was the practice of the company, in making up its annual accounts for the purpose of ascertaining the profits for distribution amongst its shareholders, to carry forward to the succeeding year a certain percentage of its premium receipts as an allowance to meet unexpired risks on outstanding policies, and that this percentage was a fair and reasonable allowance for that purpose, and the figures, on the triennial average prescribed by the Income Tax Acts, shewed a large increase in the amount of such allowance for the year of assessment:—

Held, that in the circumstances it was competent to the company to make an allowance in respect of unexpired risks, and that the increase in the allowance formed no part of the profits or gains of the year.

General Accident, Fire and Life Assurance Corporation v. *McGowan* [1908] A. C. 207, explained and distinguished.

APPEAL from an order of the Court of Appeal reversing a judgment of Bray J. on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the city of London.

The appellants, the Sun Insurance Office, appealed to the Commissioners against an assessment of 144,452*l*. for the year ending April 5, 1906, made upon them under Sched. D, s. 2, of the Income Tax Act, 1853.

The appellants carried on the business of fire insurance with a registered and head office in London and branches and agencies all over the world. Their annual premium income during the three years under average in relation to the assessment appealed against was as follows:—

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* *Present:* EARL LOREBURN L.C., VISCOUNT HALDANE, LORD ALVERSTONE, and LORD ATKINSON.

1902	£1,208,661 10*s*. 5*d*.
1903	£1,222,666 7*s*. 10*d*.
1904	£1,306,180 1*s*. 4*d*.

Apart from other reserves, as to which no question arose, the appellants had since 1888 been in the habit of carrying forward annually in their published accounts on December 31 40 per cent. of the yearly premium receipts as a reserve or allowance in order to bring about the correct incidence as between year and year of the premium income which had to answer the accidental incidence of fire losses and on the balance of which over or under the losses and charges for the year the profit or loss attaching to their business depended. The provision thus made of 40 per cent. on the premium income amounted on December 31, 1901, to 466,138*l*. 13*s*. and rose during the triennium on which the assessment appealed against was based to 522,472*l*. 0*s*. 6*d*. The increase in this allowance during the triennium amounted to 56,334*l*. and consequently affected the return for the tax year by one-third or 18,778*l*. This sum was the only matter in dispute on the appeal, the appellants claiming to reduce the assessment of 144,452*l*. by that amount.

At the hearing before the Commissioners the surveyor of taxes admitted that if the appellants were legally entitled to such allowance as was claimed by them he was not for the specific appeal in a position to contest that 40 per cent. was an accurate estimated reserve.

The appellants contended (inter alia):—

(A) That, in view of the fact that all insurance premiums are prepaid and that at any given date when a balance-sheet is drawn up payments have in fact already been received for risks which will remain to be run off after the date of the balance-sheet, to treat all premiums receivable up to the date thereof as income without deduction of the proportion prepaid and unexpired is unjustifiable and commercially unsound, and is not obligatory under the Income Tax Acts, and in any case ought not to be forced on an office which as between itself and its shareholders takes steps by means of a proper reserve for unexpired and unearned premiums to throw the real premium income into each year to answer its actual losses.

(B) That before the directors can properly include in a profit and loss account as at December 31, 1904, all premiums receivable up to that date as income they ought if not entitled to carry forward such a reserve as they in fact make in their accounts to provide in some other way for the unexpired risks and that in effect each successive year takes over from and indemnifies its predecessor against its unexpired risks and the 40 per cent. allowance made for the purpose is equally chargeable against the gross premium income as though it were a re-insurance premium paid out of pocket for the indemnity.

(C) That the premiums are earned not by being got in but by the office remaining on the risk for the agreed term of the policy and that the company is justified in throwing into each year the risk-bearing premium which belongs to it.

(D) That 40 per cent. is in fact and is recognized by the best informed opinion of the insurance world as being the irreducible minimum rate for such an allowance and that the estimate of 40 per cent. for the year of assessment had itself proved greatly insufficient by reason of the losses in respect of the San Francisco fire calamity and similarly in other years.

The surveyor of taxes contended that no allowance ought to be made for unearned premiums and relied on the cases of *Imperial Fire Insurance Co.* v. *Wilson* (1) and *Scottish Union and National Insurance Co.* v. *Smiles* and *Northern Assurance Co.* v. *Russell.* (2)

The Commissioners, after hearing evidence in support of the appeal, were of opinion that the appellants were entitled to carry a percentage of fire premiums received in one year forward in reserve in respect of unearned premiums which did not form part of the profits of the year, and they found as a fact that in the case of the appellants 40 per cent. was a reasonable and proper allowance; and they directed that the assessment should be reduced accordingly.

The surveyor of taxes expressed his dissatisfaction with the determination of the Commissioners and required them to state a case for the opinion of the King's Bench Division.

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(1) (1876) 35 L. T. 271; 1 Tax Cases, 71.

(2) (1889) 2 Tax Cases, 551.

Bray J., distinguishing *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1) (which had not been decided by the House of Lords when this matter came before the Commissioners), affirmed the decision of the Commissioners, but his decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) against their own opinion on the authority of *McGowan's Case.* (1)

1912. Jan. 23. *Danckwerts, K.C.*, and *Bremner*, for the appellants. The question raised by this appeal is how are profits to be calculated for the purposes of the Income Tax Acts in the case of a fire insurance company. The contention of the appellants is that as regards risks which do not expire at the end of the financial year the premiums received are unearned premiums and therefore cannot be treated as profits, and that a certain percentage of the premium income ought to be carried forward in respect of unearned premiums. The contention of the respondent is that no allowance ought to be made for unearned premiums. The Court of Appeal, while agreeing with the arguments of the appellants, thought that they were precluded from giving effect to their own opinion by the authority of *General Accident, Fire and Life Assurance Corporation* v. *McGowan.* (1) But that case was decided under totally different circumstances. This case differs from all the cases which have preceded it, first, because the contracts for insurance made by the appellant company are not always for one year only but extend in many cases over a series of years and the premium for the whole period is paid in advance; secondly, because for over twenty years it has been the practice of the appellant company, in arriving at its dividends for the purpose of distribution among the shareholders, to deduct an amount representing premiums unearned at the end of the year and to carry forward that amount to the succeeding year; thirdly, because it is established that the amount so carried forward is a fair and reasonable amount to carry forward as unearned premiums, and that is admitted by the respondent; lastly,

(1) [1908] A. C. 207.

because the form of account adopted by the appellants is exactly the form of account which is made compulsory by the Assurance Companies Act, 1909.

The question what are profits is really a question of fact, and the ideal way of ascertaining the profits would be to take each policy separately and apportion the liability upon it. That, however, is found to be impracticable, and therefore some artificial method of estimating the profits becomes necessary, and in this case it is admitted that the method adopted by the appellants produces the correct result. The importance of the question in this case arises from the fact that this is an increasing business, and on the three years average upon which the profits are assessed for income tax, if the appellant company is assessed on the basis of the Court of Appeal's decision, it will be over-assessed on 18,000*l.* The first case upon which the respondent relies is *Imperial Fire Insurance Co.* v. *Wilson.* (1) In that case it was not the practice of the company, in ascertaining the profits available for distribution as dividends, to make any deduction in its accounts for unearned premiums, and the percentage proposed to be deducted for the purpose of income tax was not shewn to be the right amount. In those circumstances the Court held that the company was bound by its accounts and that therefore recourse must be had to the method insisted upon by the Crown, namely, that the net profits were to be ascertained by taking on the one side the whole receipts and on the other the actual expenditure and disbursements for the given year, without making any allowance for unearned premiums. In *Scottish Union and National Insurance Co.* v. *Smiles* and *Northern Assurance Co.* v. *Russell* (2) the question did not arise for decision and the dictum of the Lord President was obiter only. Again, in *Last* v. *London Assurance Corporation* (3) the question arose incidentally only and the interlocutory observations of Day J. were merely obiter. The only other authority on the point is *McGowan's Case.* (4) That was

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(1) 35 L. T. 271; 1 Tax Cases, 71.

(2) 2 Tax Cases, 551, at p. 577; also reported sub nom. *Scottish Union and National Insurance Co.* v. *Inland Revenue,* 16 R. 461; 26 Sc. L. R. 330.

(3) (1884) 12 Q. B. D. 389, at p. 395.

(4) [1908] A. C. 207.

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a decision on the facts and the House did not there intend to lay down any hard and fast rule of law. The rule adopted by the House in that case was a rule of thumb adopted because it approximated most nearly to the actual facts, and the Lord Chancellor explained that if in any particular case the rule was shewn to work hardship it ought to be modified. That case has no application to the present. [They also referred to *Gresham Life Assurance Society* v. *Styles*. (1)]

Sir Rufus Isaacs, A.-G., and *Sir John Simon, S.-G.* (*William Finlay* with them), for the respondent. The Commissioners have decided that the appellants are entitled to bring into account as against the receipt of premiums the unexpired risks for the succeeding year and that that deduction is to be made upon an estimate of the value of such unexpired risks. That is a mere matter of speculation, and there is no warrant in any of the decisions for making a deduction from the receipts of the year upon an estimate of what will happen in the succeeding year, unless it is a permissible deduction in the Income Tax Acts.

[VISCOUNT HALDANE. Take the case of a life insurance. Do not similar questions arise there?]

Life insurance has been distinguished from fire insurance in several cases. In life insurance the contract is not a contract of indemnity, but is a contract to pay a sum of money on the happening of a certain event, usually but not universally on the death of the assured, and the actuarial value at any moment of the life of the assured is capable of calculation. In a fire insurance contract no sum need ever become payable by the insurance company and it is impossible to estimate the value of the unexpired risk on the premiums.

[VISCOUNT HALDANE. Is not the only difference the greater degree of uncertainty?]

No. It is impossible to calculate the risk with respect to the particular property insured. The only course open to the insurance company is to apportion each premium which has been received. There is no difficulty about that.

[LORD ALVERSTONE. Is not one difficulty this, that the risk is not the same in all classes of fire insurance at different periods of the year? Take, for example, the case of stack fires. In certain months of the year stack fires do not occur at all and the risk is almost entirely confined to particular months.]

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(1) [1892] A. C. 309.

Assuming that such a calculation is impracticable, then the Courts have said that the proper method of ascertaining the profits is to take the premium receipts for the year and measure against that the losses which are paid out in that particular year without making any allowance in respect of unexpired risks or unearned premiums for any part of the year, and that that is to be done upon a three years average. That method is admittedly not scientifically unassailable, and it may be a rule of thumb way of arriving at the profits, but it is a rule which has been consistently acted upon for more than thirty years. It is quite true that in the cases which have come before the Courts there has been no finding of fact that a certain percentage was a fair proportion to deduct for unexpired risks, but any percentage, not being founded on actual facts, can at best be only a rough and ready method of ascertaining the value of the unexpired risks, and the respondent's submission is that the rule laid down by the Court of Exchequer in *Imperial Fire Insurance Co.* v. *Wilson* (1) is independent of any such finding of fact. The respondent does not quarrel with the finding of fact in this case, but says that no estimate of the value of the unexpired risks is permissible. The General Rule under which the appellants fall to be assessed is r. 1, first case, Sched. D, s. 100, of the Income Tax Act, 1842 (which is made applicable to the Act of 1853), which says that the duty is to be computed on the profits of the business on an average of the three years preceding the year of assessment and is to be assessed without any other deduction than is thereinafter allowed, and this is not a deduction allowed by the Act. It may be pointed out further that the matter in dispute is not very serious because in the case of an increasing business eventually income tax has to be paid on the amount of the increase; but, according to the appellants' view, they are paying that income tax a year before it is due. The only event in which the rule of taking premium receipts against losses might produce a hardship would be if the business came to an end; but, as Kelly C.B. pointed out in *Imperial Fire Insurance Co.* v. *Wilson*(1), special provision is made for that contingency by the Income Tax Acts, and the taxpayer is entitled to claim a return of any extra amount which he may have paid in consequence of being assessed on the higher basis. This case is concluded by *McGowan's Case*.(2) The Lord Chancellor says that the method adopted in *Imperial Fire Insurance Co.* v *Wilson*(1) is a good working rule, but, no doubt, he treats it as subject to possible exceptions. On the other hand, both Lord Macnaghten and Lord Collins, it is submitted, laid it down as a rule of law applicable to all cases of fire insurance.

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(1) 35 L. T. 271; 1 Tax Cases, 71.

The House took time for consideration.

March 7. EARL LOREBURN L.C. My Lords, in this case Bray J. decided in favour of the Sun Insurance Company in a very convincing judgment. The Court of Appeal, while thoroughly agreeing with him, reversed that judgment solely upon the ground that they felt obliged to do so by the decision of this House in *McGowan's Case*.(2) I am very glad that this appeal has been brought, because no one could be more surprised than myself at the view taken of that decision by the Court of Appeal. Let me endeavour to explain my reason.

When a fire insurance company is to be assessed for income tax the main point to be ascertained will be what has been the gain or the loss upon the contracts of insurance which it has effected in each of the three years which are taken to make the average.

If it were practicable the accurate way, I suppose, would be to add together the premiums which the company became entitled to receive in each year, say 1903, upon contracts made in that year, and then to add up the losses which the company became bound to pay upon those contracts made in the year 1903. The difference between these two sum totals would shew precisely what was the gain of the company or their loss in respect of the contracts made in the year 1903.

But this is impracticable because contracts of fire insurance are made all through the year, from January 1 to December 31,

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(1) 35 L. T. 271; 1 Tax Cases, 71.

(2) [1908] A. C. 207.

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and most of them, or at all events many of them, are made to cover fire risks for a year, some, we are told, for five or six or seven years, from the date of their making. The premium is paid in advance. So the result in the way of gain or loss could not be ascertained as a fact until after the period of time had elapsed. Now the tax collector cannot be asked under the Income Tax Acts to wait till the end of that period.

Thus it appears that you cannot base the assessment of income tax upon the actual facts of the business done and the actual pecuniary results of it in the case of fire insurance companies who take single premiums to cover risks for a year or for more years. This is such a company, and I believe nearly all companies are in the same position.

If that be so, it follows that in assessing such fire insurance companies you must proceed wholly or in part by estimate.

An estimate being necessary and the arriving at it by in some way using averages being a natural and probably inevitable expedient, the law, as it seems to me, cannot lay down any one way of doing this. It is a question of fact and of figures whether what is proposed in each case is fair both to the Crown and to the subject.

In *McGowan's Case* (1), to which reference is made, three methods of estimating these gains or profits were before the House. I place first, merely for convenience' sake and not for its importance or value, a faint suggestion which was made in the case of *McGowan* (1), and which as I understood it was as follows. It was suggested that each contract of insurance made during a particular year should be considered separately. If it had expired, then the actual result should be taken, whether profit or loss. If it had not expired, then an estimate should be made, having regard to the period unexpired and the degree of risk, which might be different (in summer and winter for example) during that period.

I do not imagine that either the Crown or the company would seriously desire such an inquiry. I do not know how many fire insurances are effected by a great company within a twelvemonth, probably scores of thousands or even hundreds of thousands.

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(1) [1908] A. C. 207.

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Such a process, as to the unexpired contracts, would be minute and almost interminable. It was rejected because there was no evidence that it would be a reasonable way of ascertaining what was desired.

The second method suggested in that case was that of merely taking for each year the sum total of the premiums received and the sum total of the losses paid and subtracting the one from the other, without regard to the fact that the premiums cover risks running on into subsequent years and the losses include losses arising out of contracts made in previous years. This method is of course not precise or scientific. It proceeds upon the view that when this is done for the three consecutive years indicated by the statute and the figures thus reached are averaged, a fair and reasonable conclusion is attained.

This method was adopted long ago and has more than once been the subject of consideration in Courts of law. I can conceive it being unfair either in the case of a rapidly increasing or of a rapidly diminishing fire insurance business. It may prove unfair in other cases. But in *McGowan's Case* (1) it was not proved to be unfair. On the contrary it closely corresponded with the dividends actually distributed and was upon the facts of that case clearly the most accurate and reasonable of the methods which alone were propounded for our consideration. Accordingly it was adopted.

I think it is in general a good working rule, but no one in this House has said that it ought to supersede the truth if the truth is in conflict with it in any case.

A third method, similar in principle to that advanced by the now appellants, was also considered by your Lordships in the case of *McGowan.* (1) This method is to carry forward annually at the close of the year a percentage of the premium income in order to allow for unexpired risks. It has no pretensions to being precise. I can easily imagine cases in which an actuary could shew it was misleading. But if it comes nearer to the truth than any other method in a particular case, I do not understand why it should not be adopted.

(1) [1908] A. C. 207.

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This third method, however, in its application to that case, the *McGowan Case* (1), would have meant that the insurance company was to pay income tax upon the footing of about 15,000*l.* or 20,000*l.* profits and gains in the three statutory years, whereas they had divided dividends of about 60,000*l.* in those three years. And there was no evidence and no finding, nor could there honestly have been, that the third method worked fairly between the Crown and the subject.

In those circumstances this House rejected the third method. The House adopted the second, but, so far from laying it down as a rule of law, it was expressly pointed out that the second method was of itself imperfect and, though a good working rule generally, would not be applicable if in any case it appeared upon the facts to involve hardship. The head-note in the *Law Reports* is quite wrong.

After this preface, tedious but necessary in the circumstances, I come to the merits of the present appeal. Here again there is a competition between two methods of estimate. That which I have called the second is propounded by the Crown. That which I have called the third is propounded by the company, who deduct 40 per cent. of the premiums at the end of each year. The relevant facts are here the reverse of what they were in the case of *McGowan.* (1) The third method has been examined by the Commissioners and is stated in the special case to be right in this case. It was in terms admitted by the surveyor of taxes before the Commissioners that the fair and reasonable allowance for this company to make if entitled to make any allowance was 40 per cent. The surveyor's point was that no allowance or deduction at all ought to be made, because he said the proper method according to law was the second method. He did not prove, or try to prove, that it was fair in this case. So that all the evidence and the finding in the present appeal was in support of the appellants' contention. In these circumstances it seems to me quite obvious that the third and not the second method must be applied here for the plain reason that upon the materials before us it is the fair and only way presented to us by which the truth can be approximately attained.

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(1) [1908] A. C. 207.

In the hope that it may help to prevent future misunderstanding I will recapitulate my own opinion. There is no rule of law as to the proper way of making an estimate. There is no way of estimating which is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case. Experience seems to have satisfied Courts of law for a considerable time that the method which I have described as the second is a useful working rule. But no one has said in this House that there is any constraint to accept it. It may be that the character or mode of carrying on this insurance business may alter or may have altered, and what was a good method once may become inaccurate or even obsolete.

I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the Commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it the Crown can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, namely, that the true gains are to be ascertained as nearly as it can be done.

I think this appeal must be allowed.

VISCOUNT HALDANE. My Lords, income tax is imposed by the Income Tax Acts upon the profits or gains (calculated according to averages) arising from business, certain deductions being prohibited, especially by the rules of the cases in Sched. D, none of which prohibitions affect the question that arises on this appeal. It is therefore necessary to ascertain in the first instance whether the claim of the Crown in the present proceedings is confined to the profits and gains which the statutes prescribe as its legitimate subject-matter.

The appellants carry on the business of fire insurance. It has been their practice to carry forward annually 40 per cent. of their yearly premium receipts, in order to bring about the correct proportion, as between year and year, of the premium income which has to answer to the annual incidence of fire losses, and on the balance of which income, over or under the losses or charges for the year, the profit or loss attaching to their business depends. If the premium income were stationary this would make but little difference as regards income tax, for a uniform amount deducted would be carried forward to profit in the ensuing year. But the business of the appellants and their premium income are increasing, with the result that the amount escaping the tax in each year varies progressively. The Commissioners for Taxes in the city of London, after examining the case, were of opinion that the percentage carried forward in each year was a reasonable and proper allowance, and did not form part of profits or gains for the year. The surveyor admitted that he was not in a position to contest that the percentage carried forward was accurately estimated, but contended that the appellants were liable in respect of the entire premium income, on the ground that the Courts had laid down that no such deduction was permissible. A case was stated for the opinion of the High Court of Justice, and Bray J. decided in favour of the appellants. The Court of Appeal reversed his judgment and decided in favour of the Crown, on the ground that they were bound by the decision of this House in the case of *General Accident, Fire and Life Assurance Corporation* v. *McGowan.* (1)

It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when (as was not the case here) some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap. Such a presumption was made in the appeal referred to, where, as pointed out in the judgment delivered by the Lord Chancellor, it was not shewn that the percentage deducted represented the real value of risks yet to run, and was so unearned, and where it appeared further that the company had actually divided the entire amount without deduction among its shareholders as part of the profit of the year. In *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1) it was therefore, in the absence of evidence to the contrary, presumed that the whole of the premium income received in the year represented income earned by bearing the risks of the year. It is difficult to see how, on the materials before the House, the decision could have been otherwise, but it seems to me equally clear that the reason of the decision has no application where, as here, it has been accurately ascertained that part of the premiums are not in the nature of profit earned. As Bray J. puts it, the case is analogous to one in which if goods are bought their value cannot be treated as profit without deducting the value of the liability to pay for them which the buyer has incurred. Such cases as *Imperial Fire Insurance Co.* v. *Wilson* (1) and *Scottish Union and National Insurance Co.* v. *Smiles* and *Northern Assurance Co.* v. *Russell* (2) are not, when carefully examined in the light of what appears to be the true principle, reliable as authorities for a proposition which would run counter to the practice and good sense of the commercial community. The judges in the Court of Appeal appear to have thought themselves bound to hold that this House had laid down a rule of law so rigid that, although introduced for the purpose of supplying deficient evidence of fact, it must still apply even where there was no deficiency of proof. I have come to a different conclusion. I think that Bray J. has correctly interpreted the decision in question, when he says that if in the earlier case such facts had been before this House as have been established in the present case, it would, in his opinion, have decided against the Crown. The present appeal ought, in my judgment, to succeed.

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(1) [1908] A. C. 207.

LORD ALVERSTONE. My Lords, this is an appeal by the Sun Insurance Office against the decision of the Court of Appeal reversing a decision of Bray J.

The question raised by the appeal is as to the right of the appellant company, in estimating the annual profits or gains for the purpose of the Income Tax Acts, to make a deduction in respect of premiums on policies still current at the end of the financial year.

The facts are not in dispute. The appellants issue policies

(1) 35 L. T. 271; 1 Tax Cases, 71.

(2) 2 Tax Cases, 551.

for periods of twelve months and possibly longer; the risks on these policies run not from a fixed date, but from the dates named in the policies, which may be any day in the year; in consequence, at the end of the financial year, there are invariably a considerable number of policies still running, in respect of which the appellants are still under liability to pay should any loss occur.

The appellants claimed that inasmuch as the premiums on such policies cover a period beyond the financial year the total amount of premiums on such policies cannot be treated as ascertained profits, as the company may be called upon to pay losses under and by virtue of the contract still existing.

It is not disputed that as a matter of principle the claim of the appellants is well founded. Premiums are not profits or gains, they are receipts which must be brought into account, and out of which, after proper deduction for losses, profits will accrue. If the actual amount of the premiums received in any financial year were substantially constant the assessment of gains and profits after the second year would not be affected; but the business of the appellants was an increasing business, and for the three years 1902, 1903, and 1904 the increase in the amounts reserved in respect of unexpired risks, being 40 per cent. of the premium income, averaged 18,788*l.* per annum.

The only matter in dispute was the right of the appellants in estimating the profits or gains to make a deduction in respect of the outstanding premiums due to increased business during the three years under consideration. The matter was investigated by the Commissioners of Income Tax, who, after hearing evidence, were of opinion that the company was entitled to carry forward a percentage of fire premiums in one year in respect of unearned premiums which did not form part of the profits of the year. It was not disputed by the surveyor of taxes that if the company were legally entitled to such an allowance, he was not in this appeal in a position to contest that 40 per cent. was an accurate estimate to reserve, and the Commissioners found as a fact that in the case of the Sun Fire Insurance Office 40 per cent. was a reasonable and proper allowance. It was not seriously contested by the Attorney-

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General that on principle the appellants were entitled to make some deduction, but he contended that as a matter of law no deduction was permissible in respect of unexpired risks, and he further contended that the decision of your Lordships' House in the case of *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1) had laid down as a principle of law that no such deduction could be permitted. With regard to the justification for such a deduction it is quite unnecessary to state any reasons. Bray J. and the members of the Court of Appeal have expressed in the strongest terms their opinion that some such deduction ought to be made. The only question, therefore, requiring consideration is whether there is any rule of law or any decision of your Lordships' House which prevents the appellants being entitled to claim such a deduction.

The question of what are profits or gains within the meaning of the Income Tax Act is prima facie a question of fact, and if the cases from *Imperial Fire Insurance Co.* v. *Wilson* (2), in the year 1876, down to *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1), in the year 1908, be examined, it will be found that in every case the Courts have treated the question as one of fact, and have merely decided whether upon the facts before them the claim of the taxpayer to make a deduction in a particular way was justified. The Attorney-General contended that no estimate was permissible in arriving at the amount to be deducted, and he based this argument principally on the language of the judgment of the Court of Exchequer in *Imperial Fire Insurance Co.* v. *Wilson* (2), and the language of the Lord President in the case of *Scottish Union and National Insurance Co.* v. *Inland Revenue* (3), cited in the judgment of the Master of the Rolls, but in each case, if properly examined, it will be found that the Court were dealing with a question of fact, and were only approving that which in their judgment appeared to be the best solution of that question, the method which had been approved in the case of *Imperial Fire Insurance Co.* v. *Wilson.* (2) Coming now to the case upon which express reliance was placed by the respondent, who in his case states that it is governed by the decision of your Lordships' House in *McGowan's Case* (1), in that case the mode of estimating the proper deduction put forward by the then appellants was rejected by your Lordships' House as being absolutely unjustified upon the facts. See the judgment of the Lord Chancellor at p. 212, who decided that the particular correction sought by the appellants in that case was indefensible upon the materials before the House, and that the method adopted by the Commissioners was a good working rule in the then present instance and generally. But your Lordship, the Lord Chancellor, went on to say that if in any particular case an insurance company could shew that it worked hardship, the rule ought to be modified so that the real gains and profits might be ascertained as near as may be. It is said that Lord Macnaghten in his judgment went further, but I have seen nothing to lead me to believe that Lord Macnaghten was purporting to lay down any rule of law; he was, in my opinion, only expressing very strongly his view upon the facts then before your Lordships' House.

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(1) [1908] A. C. 207.
(2) 35 L. T. 271; 1 Tax Cases, 71.
(3) 16 R. 461; 26 Sc. L. R. 330.

I adopt the reasoning in the judgment of Bray J., who considered that properly understood the case of *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1) was a decision upon the facts and not on law, and I am unable to agree with the decision of the Court of Appeal that your Lordships intended to lay down any binding rule that as a matter of law no such deduction could be allowed. For these reasons I am of opinion that the decision of the Court of Appeal should be reversed and the judgment of Bray J. restored.

LORD ATKINSON. My Lords, in this case the learned Lords Justices in the Court of Appeal, apparently, considered themselves coerced by some rule of law, supposed to have been laid down in your Lordships' House in the case of *General Accident, Fire and Life Assurance Corporation* v. *McGowan* (1), to pronounce a decision repugnant to their own sense of right and justice.

(1) [1908] A. C. 207.

Speaking for myself, I feel bound to say, with all respect, that I find great difficulty in seeing how, if that case be examined in a fair and reasonable, even though critical, spirit, it can be supposed that in it any rule of law was laid down, or anything decided as a matter of law. Two different practical methods for ascertaining the profits and gains of the appellants' business for the purposes of the Income Tax Acts were suggested and insisted upon by the respective parties in the case. The method insisted upon by the appellants led, on the facts, to grotesque results, while that insisted upon by the respondent, which was the same as that contended for by the Crown in the present case, led to comparatively accurate and just results. This latter method was proved to be the usual method, and was considered to be simple, practical, and easily applied. A third method was suggested which was not practical. Your Lordships had to choose between the two practical methods, and you chose that which led to the just results. That was all.

That, however, is a very different thing from deciding, as a matter of law, that the method so approved of was the only legal method which could be adopted in such cases, or that deductions were never to be made from the premiums received on fire policies in respect of risks unexpired at the time the yearly accounts of the company were made up. A little consideration of one of the most illuminating authorities in the books upon this question of the mode of ascertaining the taxable gains and profits of trading and commercial businesses, namely, *Gresham Life Assurance Society* v. *Styles* (1), will shew conclusively that, consistently with that authority, no such rule could be laid down as a matter of law. The very nature of the thing forbids it. That case clearly decided that the receipts of a business are not in themselves profits and gains within the meaning of the Income Tax Act; but that it is what remains of those receipts after there has been deducted from them the cost of earning them which constitutes the taxable profits and gains. Now what is the service which a fire insurance company renders to each insurer in consideration for the premium it receives? It is only by rendering this service in each case it earns these receipts. The service consists in indemnifying the insurer against loss by fire during the continuance of his policy. The company is entitled to deduct what it will cost it to perform that service. In any given case where a fire occurs the loss, and therefore the cost of the service by which the premium is earned, may and almost certainly will vastly exceed the premium, but in the aggregate of all the policies the aggregate cost will, of course, be much less than the aggregate premiums. The difficulty of the position consists in this, that until the time for which a policy is to remain effective has expired, nobody can tell precisely how much the service will cost. Yet until that time has expired the service for which the company has been paid has not been completely performed. If the accounts of the company are to be rendered before the date of expiry, then some division of the premium must be made, and the portion to be appropriated to the service already rendered ascertained, the balance being appropriated to that portion of the service which is to be performed thereafter. I think the description, "unearned premium," which has been used to describe this latter portion, is a very appropriate and accurate description.

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(1) [1892] A. C. 309.

It is obvious that the entire premium cannot in every case be divided in the same proportions as those into which the accounting period divides the entire duration of the policy, because the risk is not the same for each calendar month or each season. On the contrary, the risk is admittedly greater in the winter months than in the summer months, because fires and artificial light are more used in the former than in the latter; for instance, if the 31st of December be the accounting day, and the policy be effected on the 1st of July, it might be quite right to divide the premium into two equal portions, one half being treated as earned in the year the policy was effected, and the other half as to be earned in the succeeding half-year; but if the policy were effected on the 1st of October, then it would, obviously, be unfair, on account of this greater risk, to treat only one quarter of the entire premium as having been earned in the three winter months of October, November, and December. Having regard, therefore, to the fact that companies carrying on this kind of business are, under the decision of your Lordships' House, clearly entitled to object to their receipts being treated as per se their profits and gains without the proper deduction having been made of the cost of earning those receipts, it is obvious that the amount of the taxable profits and gains can only be ascertained by some system of averages or estimation, or by some other practical rule of thumb based upon experience and the facts of different cases.

As I understand, Fletcher Moulton L.J. is of opinion that some method might be adopted by which the problem could be solved with scientific accuracy. Unfortunately he does not describe in detail what that method is. It may, for all that appears, involve such complicated calculations in reference to each particular policy as to be practically unworkable, and certainly it does not appear to me that it is possible to adopt any method which would not involve recourse at some stage of its processes to estimates, averages, or such like things. If these matters be borne in mind, it does seem strange that it should have been supposed that it could ever have been laid down as a matter of law that one method, and one method alone, could legally be employed to solve the problem.

Now, to turn to a detailed examination of *McGowan's Case.* (1) If any meaning is to be given to words, no ingenuity can find in the judgment of the Lord Chancellor anything equivalent to a statement that, as a matter of law, only one rule or method could be applied to reach the desired result. On the contrary, at p. 212 of the report, he is reported to have used these words: "I think the particular correction sought by the appellants in this case is indefensible upon the materials before us, and, further, that the method adopted by the Commissioners is a good working rule in the present instance and generally. If in any particular case an insurance company can shew it works hardship, no doubt the rule ought to be modified so that the real gains and profits may be ascertained as near as may be. I am for dismissing this appeal." That clearly means this, that the method adopted by the Commissioners is not the only method which can be legally adopted, but is a good working method for general use, to be departed from where it is shewn to work injustice.

Lord Ashbourne said he concurred with the Lord Chancellor. That may mean that he merely concurred in the conclusion at which the Lord Chancellor had arrived, or that, in addition, he adopted every word the Lord Chancellor has said. I understand that, according to the practice of your Lordships' House, mere concurrence, as Lord Ashbourne expressed it, conveys the former meaning, not the latter. Lord Macnaghten then delivered judgment. It is contended that his judgment amounts to a decision that the rule adopted by the Commissioners is the only rule which can legally be adopted in such cases to ascertain the amount of the taxable profits and gains.

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(1) [1908] A. C. 207.

I do not myself think that a fair and reasonable construction of Lord Macnaghten's language leads to any such conclusion; but if I am mistaken in that view, then it cannot be disputed that the conclusion at which he arrived (quite unnecessary for the decision of the case) is the very contrary of that at which the Lord Chancellor arrived. The one noble Lord says in effect that the rule is not a rule of law at all, but is generally a good working rule to be departed from when it is shewn to work injustice, and the other lays it down that it is the only legal rule, is to be invariably applied, and can never be departed from whether it works injustice or not. No two statements could be more irreconcilable. Well, Lords James of Hereford and Robertson and I myself then stated we concurred; but concurred with what or in what? I know their minds were too logical, and I hope my own mind was too logical, to agree at the same moment with each of two contradictory and irreconcilable propositions. We must therefore either have considered that the two judgments meant the same thing, or our concurrence must have been limited to a mere concurrence in the result arrived at by both our colleagues without adopting the precise language of either.

It is, I think, plain, that Lord Collins, in his judgment, delivered after our concurrence had been expressed, did not use any language from which it could be fairly or legitimately inferred that, in his view, the rule approved of by the Lord Chancellor was the only rule which could be legally applied in such cases. I am, therefore, clearly of opinion that *McGowan's Case* (1) is no authority whatever for the proposition that the rule adopted so reluctantly by the Court of Appeal is the only legal rule which can be applied for the purpose indicated. If the Court of Appeal considered, as apparently they did consider, that case was an authority for such a proposition binding upon them, they were, in my view, with all respect, entirely mistaken. It was, I think, quite open to them to approve of a different method of ascertainment which would lead to what they considered true and just results. In this particular case it is shewn upon the evidence that the method contended for by the appellants is, in this instance at all events, a better method, juster and more satisfactory in its application and results than that insisted upon by the Crown. It should, therefore, I think, be approved of and applied in preference to the latter. I accordingly am of opinion that this appeal should be allowed with costs.

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(1) [1908] A. C. 207.

Order of the Court of Appeal reversed. The respondent to pay to the appellants the costs here and below.

Lords' Journals, March 7, 1912.

Solicitors for appellants: *Dawes & Sons.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

SALFORD CORPORATION AND OTHERS . . APPELLANTS; H. L. (E.)*

AND 1912

ECCLES CORPORATION . . . . RESPONDENTS. March 29.

Tramway — Statutory Powers — Ultra vires — Adjacent Districts — Working Agreement—Licence to Work—Consent of Board of Trade—Eccles Corporation Act, 1901 (1 *Edw.* 7, *c. cxxii.*), *ss.* 3, 24—*Salford Corporation Act*, 1899 (62 *&* 63 *Vict. c. ccxliv.*), *ss.* 3, 4, 28—*Tramways Act*, 1870 (33 *&* 34 *Vict. c.* 78), *ss.* 19, 34, 35.

The Eccles Corporation were authorized by a special Act, which incorporated Parts II. and III. of the Tramways Act, 1870, to construct and maintain certain tramways in their district and to enter into agreements, subject to the approval of the Board of Trade, with the owner of any tramways in any adjacent district with respect to the construction, sale, lease, working, use and management by the contracting parties of all or any of their respective tramways. The proposed tramways were adjacent to tramways outside the Eccles district of the Salford Corporation on the east and of a tramway company on the west. Both the Salford Corporation and the tramway company had under their special Acts similar powers of entering into working agreements with the tramway owners of adjacent districts, except that the consent of the Board of Trade thereto was not required. The Eccles tramways were constructed by the Salford Corporation under the terms of an agreement entered into between the two corporations with the approval of the Board of Trade, and the Salford Corporation were entitled thereunder to a lease of these tramways for a term of years. By the special Act of the Salford Corporation, unless the subject or context otherwise required, the corporation tramways were defined as including any tramways demised to or worked by the corporation. During the currency of the agreement, the Salford Corporation, without the leave of the Eccles Corporation or of the Board of Trade, granted to the tramway company a revocable licence to run over a small portion of the Eccles tramways which adjoined the company's tramway system:—

Held, that the Eccles Corporation could not have granted the licence without the sanction of the Board of Trade, and that the Eccles tramways were not part of the Salford Corporation tramways within the definition clause of the Salford Act, so as to take them out of the operation of the Eccles Act, because the subject or context did otherwise require.

Held, therefore, that the licence was ultra vires.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Eve J. (1)

* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

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(1) [1910] 2 Ch. 263.

The respondents, the Eccles Corporation, were the plaintiffs, and the appellants, the Salford Corporation and the South Lancashire Tramways Company, were the defendants in an action whereby the Eccles Corporation claimed a declaration that the Salford Corporation were not entitled to authorize the South Lancashire Tramways Company (hereinafter called the tramway company) to use the tramways of the plaintiff corporation or any part thereof, and an injunction to restrain the tramway company from running tramcars over and along the said tramways and from otherwise using or trespassing upon the said tramways.

The borough of Eccles was bounded on the east by the borough of Salford and on the west by the Worsley urban district. The Salford Corporation owned and worked tramways in their borough under the Salford Corporation Act, 1899 (62 & 63 Vict. c. ccxliv.), and the tramway company owned and worked tramways in the Worsley urban district and elsewhere under the South Lancashire Tramways Acts, 1900 and 1903 (63 & 64 Vict. c. ccxliii. and 3 Edw. 7, c. clviii.). The tramways of the Salford Corporation extended to the eastern boundary, and the tramways of the tramway company to the western boundary, of the borough of Eccles.

By the Eccles Corporation Act, 1901 (1 Edw. 7, c. cxxii.), Parts II. and III. of the Tramways Act, 1870, so far as the same were applicable for the purposes of, and were not varied by or inconsistent with, the said Act of 1901, were incorporated therewith (s. 3), and the Eccles Corporation were empowered to lay down, use, and maintain certain tramways within the borough, including the tramway in question in this action (s. 5), and were liable to maintain and keep in good repair the rails of the tramways and the substructure on which they rested, and were subject to penalties in case of default (s. 13).

Sect. 24 provided as follows: "The corporation may enter into and carry into effect contracts and agreements with the owner and lessee of any tramways in any adjacent district which can be worked with any of the corporation tramways and the local authority of such district with respect to the alteration construction maintenance purchase sale lease working use and

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management by the contracting parties of all or any of their respective tramways and works or any part or parts thereof respectively the making of all necessary junctions the supply under or during the continuance of any agreement for all or any of the respective tramways of the contracting parties being worked by the other of them as aforesaid of rolling stock plant machinery and electrical energy or power necessary for the purposes of such agreement . . . . the payments to be made and the conditions to be performed in respect of such alteration construction maintenance working use and management the interchange accommodation conveyance transmission and delivery of traffic coming from or destined for the respective undertakings of the contracting parties and the division and apportionment of the revenue arising from such traffic and the payment of any fixed or contingent rent:

"Provided that the term of any such lease or working agreement shall not exceed forty-two years and that the conditions thereof shall be subject to the approval of the Board of Trade."

By the Salford Corporation Act, 1899, Parts II. and III. of the Tramways Act, 1870, were incorporated therewith in language similar to that used in the Eccles Corporation Act (s. 3). By the definition clause (s. 4), "In this Act unless the subject or context otherwise require—'The corporation tramways' includes the tramways and any tramways for the time being belonging or demised to or worked by the corporation."

Sect. 28 conferred upon the corporation power to enter into working agreements "with the owner and lessee of any tramways in any adjacent district which can be worked with any of the corporation tramways and the local authority of such district" in terms almost identical with the terms used in s. 24 of the Eccles Corporation Act, except that the section of the Salford Corporation Act contained no restriction as to the duration of any lease or working agreement thereunder and did not require the consent of the Board of Trade to such lease or working agreement.

The South Lancashire Tramways Act, 1900 (which also incorporated Parts II. and III. of the Tramways Act, 1870, in the terms above stated), by s. 83, conferred upon the tramway company a similar power of entering into working agreements with adjacent tramway owners, but the Act contained no provision requiring that such agreements should receive the approval of the Board of Trade. A similar power was also conferred on the tramway company by their special Act of 1903.

By an agreement dated April 11, 1902, and made between the Eccles Corporation and the Salford Corporation and duly approved by the Board of Trade, the Eccles Corporation, by clause 4, empowered the Salford Corporation at the expense of the former to construct the tramways comprised in the Eccles Corporation Act, 1901 (thereinafter called the tramways), including the tramway in question in this action. By clause 14 the Eccles Corporation agreed to grant to the Salford Corporation a lease for thirty-five years from the second Monday following the date on which the tramways should be certified by the Board of Trade to be fit for public traffic to use, work, and run cars with flange wheels upon the tramways, such lease to contain covenants, stipulations, and agreements to the effect mentioned in the fourth schedule to the agreement with all other covenants, stipulations, and agreements reasonably appropriate to effectuate the true intention of the agreement, and by clause 18 the provisions of the fourth schedule were to apply until the lease should take effect.

By clause D of the fourth schedule the tramcars of the Salford Corporation and the drivers and conductors thereof duly appointed by the Salford Corporation and intended to ply for hire in the borough of Eccles were to be licensed by the Eccles Corporation.

By clause E the Eccles Corporation were to maintain the tramways with the permanent way and also the electrical equipment of the tramways in an efficient state for traffic and to execute all repairs and renewals requisite therefor from time to time to the reasonable satisfaction of the Salford Corporation.

By clause F the agreed lease was to be made with the benefit of the rights and subject to the powers and obligations of the Eccles Corporation under any Act or Order relating to the tramways (except where inconsistent with the terms of the agreement and of the agreed lease) and to be subject to the approval of the Board of Trade if and so far as necessary, "Provided always that nothing contained or implied in this agreement or in any such Act or Order shall enable the Eccles Corporation by any act or omission on their part to confer upon any person company or body (other than the Salford Corporation) or upon the public or to reserve to or confer upon the Eccles Corporation (except as by this agreement is expressly reserved and provided) any right during the continuance of the agreed lease to use the tramways either concurrently with the Salford Corporation or otherwise by means of carriages with flange wheels or wheels suitable only to run on the rails of the tramways the intention of the two corporations being that the Salford Corporation are to have assured to them by the agreed lease (except and subject as hereinafter provided) the exclusive use of the tramways by means of carriages with flange wheels or wheels suitable only to run on the rails of the tramways."

By clause K the Salford Corporation were required to provide an efficient through service of cars in connection with the Salford system of tramways as therein mentioned.

Clause L provided for the efficient management of the tramways by the Salford Corporation and save as provided by clause E for the payment by them of all charges and expenses incurred in such management.

By clause O the Salford Corporation agreed to permit the Eccles Corporation between the hours of midnight and 5 o'clock in the morning to use the tramways for scavenging purposes free of charge, but not for the conveyance of passengers, provided that the Eccles Corporation should not exercise such right so as to interfere with the use of the tramways by the Salford Corporation.

Clause R provided as follows: "The Salford Corporation shall not assign or sublet or part with the benefit of this agreement or the agreed lease except by licence under the seal of the Eccles Corporation and upon any breach of this stipulation the Eccles Corporation may forthwith determine and cancel the said agreement or agreed lease and the interest of the Salford Corporation thereunder shall thereupon cease without prejudice to any liability previously incurred by them to the Eccles Corporation."

No lease was in fact granted to the Salford Corporation. The tramways mentioned in the agreement were duly constructed by the Salford Corporation and were worked by the corporation pursuant to the agreement, but a small portion of the line which ran in a north-westerly direction along the Worsley Road from the point where it was joined by Parrin Lane to Alder Forest, which was on the western boundary of the borough of Eccles, (being the tramway in question in this action) was only worked intermittently by the Salford Corporation. This tramway formed the connecting link between the Eccles tramways and the tramways of the South Lancashire Tramways Company. On June 2, 1908, the Salford Corporation granted to the tramway company a licence to use this part of the tramways upon the terms of a letter of that date addressed by the general manager of the Salford Corporation tramways to the general manager of the tramway company. The letter stated as follows:—

"Referring to the interview between us yesterday I beg to inform you that if your company desire to run cars over the line leased to the Salford Corporation between Alder Forest and Parrin Lane, Winton, the Tramways Committee will be quite prepared to permit it on the understanding that you pay us for the current used by such cars at the rate of 1·89*d.* per car mile run, and also a further sum of threepence per car mile run to cover the maintenance of the lines, overhead equipment etc. It must be distinctly understood that it is a mere licence and confers no rights whatever on your company and the corporation will be entitled to stop the cars running whenever they so desire, and your company will be entitled to cease running at any time they desire."

In answer to remonstrances from the Eccles Corporation the Salford Corporation claimed the right to authorize the tramway company to run cars over the tramway in question without the leave or licence of the Eccles Corporation, and thereupon the Eccles Corporation issued the writ in this action. Eve J. held that the licence was not ultra vires and was not a breach of the agreement of April 11, 1902, and he dismissed the action.

The Court of Appeal held that neither under the Tramways Act, 1870, nor under their special Act had the Eccles Corporation any power to authorize the tramway company to run cars over their tramways without the consent of the Board of Trade, and that their agreement with the Salford Corporation did not purport to confer on the latter any greater right than that which they, the Eccles Corporation, had authority to grant. They therefore held that the licence was ultra vires and granted the relief claimed by the statement of claim.

1912. March 28, 29. *E. Clayton, K.C.*, and *E. Sutton* (*MacSwinney* with them), for the appellants. The appellants admit that a statutory monopoly to do what is otherwise a nuisance—to construct and work tramways along a public highway—is a personal privilege and cannot be handed on by the promoters to any one they please without statutory authority, but the appellants justify this licence under their special Acts and they submit further that the Eccles Corporation have no right to complain because they have leased their tramways to the Salford Corporation. The Tramways Act, 1870, involves the existence of a special Act, and the Court of Appeal have gone wrong in treating the general Act as overriding the special Acts in this case. Parts II. and III. are incorporated in those special Acts only so far as they are not varied by or inconsistent with those Acts. The Court of Appeal—and especially Farwell L.J.—have proceeded on the view that nobody but promoters or lessees or licensees under the Act of 1870 can have power to run tramways at all, but that is erroneous. The only power to grant leases under that Act is limited to leases for a term not exceeding twenty-one years, and the only power to grant licences is a special power given to the Board of Trade where it is shewn that the tramways are not being properly worked by the promoters for the benefit of the public. That has no application to the facts of this case. [They referred to the Tramways Act, 1870, ss. 19, 22, 34, 35, and 44.] No doubt the Legislature contemplated that the limited power of leasing given by that Act would meet all requirements, but subsequent developments have shewn the necessity of providing for working agreements for the interchange of traffic between different tramway systems. By s. 4 of the Salford Corporation Act the corporation tramways are defined as including any tramways demised to or worked by the corporation. By s. 28 the corporation are empowered to enter into working agreements with the owner of any tramways in any adjacent district, and under that section the sanction of the Board of Trade is not required. Sect. 83 of the special Act of the South Lancashire Tramways Company confers a similar power on that company, and there again the sanction of the Board of Trade is not required. The tramways which have been agreed to be leased to the corporation are the tramways of the corporation within the definition in s. 4 of their special Act, and the South Lancashire Tramways Company are adjacent owners within s. 28 of that Act. It follows that under that section the Salford Corporation have power to grant this licence to the tramway company, who are proper recipients of the licence, inasmuch as the company have authority under their special Act to enter into agreements to run cars over the tramway in question. The Court of Appeal have held that the Salford Corporation cannot grant this licence because the Eccles Corporation could not have granted it without the sanction of the Board of Trade, but that is a mistake, because by the agreement for the lease the Eccles Corporation have parted with their whole interest in their tramways during the currency of the agreement, and these tramways have for the time being become part of the Salford system and subject to the Salford Act. Further, it is submitted that this licence, even if granted by the Eccles Corporation, would not have required the sanction of the Board of Trade, because a mere revocable licence is not a working agreement within s. 24 of the Eccles Act, and there is nothing in the Tramways Act, 1870, which requires the consent of the Board of Trade to a licence of this character.

[EARL LOREBURN L.C. In my opinion—and I believe my learned friends agree with me—the Eccles Corporation could not have granted this licence under s. 24 of their special Act without the sanction of the Board of Trade. Then are these Salford tramways? The definition in s. 4 of the Salford special Act is prefaced by the words " unless the subject or context otherwise require." Do not those words apply to this case?]

There is no ground for excluding these tramways from the definition in s. 4, but, even if they are excluded, the tramway company are still adjacent owners notwithstanding the interposition of the Eccles district. "Adjacent" is not equivalent to adjoining and does not mean absolutely touching. Then the Court of Appeal have held that this licence is contrary to the agreement between the two corporations, but that view is founded upon a misapprehension of the meaning of the word "exclusive" in clause F of the fourth schedule to the agreement. That clause, following the language of s. 34 of the Tramways Act, 1870, says that the intention of the parties was to assure to the Salford Corporation by the agreed lease the exclusive use of the tramways by means of carriages with flange wheels. That exclusive use is not a mere easement, but is an estate and interest capable of alienation, and the word "exclusive" is descriptive of the interest and has reference to the exclusion of the public; it was not intended to denote any restriction on the right of transmission or alienation. Then it is said that this licence is a breach of clause R, but it is settled that a mere revocable licence is not a parting with the benefit of the agreement. Lastly, this action, being an action for trespass, cannot be maintained by the Eccles Corporation, who are mere reversioners and have no estate in possession.

P. O. Lawrence, K.C., and *J. E. Harman*, for the respondents, were not called upon.

EARL LOREBURN L.C. My Lords, I think the decision of the Court of Appeal in this case ought to be affirmed. The ground upon which the Court of Appeal decided it expressly has not really arisen in argument before us, because another point emerged which was sufficient to prove fatal to the case of the appellants. I do not propose in the least degree to dissent from any of the reasoning of the Court of Appeal; but as that aspect of the matter upon which they decided has not been really argued fully here, I prefer to rest my decision upon the point that was fully argued by the appellants, and fruitlessly.

My Lords, in this case a licence has been given. It is clear to my mind that Eccles could not have granted this licence without the consent of the Board of Trade. It is also the fact that the consent of the Board of Trade was not obtained to this licence. But it is said that there is a demise for thirty-five years from the Eccles Corporation to the Salford Corporation; and it is further said that under the 4th section of the Salford Act this tramway having been so demised became a Salford Corporation tramway, and that, in some way which I do not wholly follow, it is shifted from the operation of the Eccles Act and becomes liable only to the limitations contained in the Salford Act. It is further said that, that being so, s. 28 of the Salford Act enables the Salford Corporation to give this licence without the consent of the Board of Trade.

My Lords, I do not think it is so. I must observe that this suggested complete or partial emancipation from the Eccles Act, under which the tramway was built, to the Salford Act, under which it was not built, would be a rather strange result to spring from a definition clause. But it is not necessary to scrutinize too closely the language of the definition in the Salford Act, because the definition is expressed to be "unless the subject or context otherwise require." To my mind it is quite clear that the subject or context does otherwise require, and we are not therefore constrained by the ingenious argument that has been presented to us by the counsel for the appellants.

I desire to dismiss with respect but without further comment the suggestion that the Eccles Corporation is in some way a reversioner only and is disentitled to maintain this action whether for trespass or for an injunction.

Under these circumstances, I move your Lordships to dismiss this appeal with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD ATKINSON. My Lords, I am of the same opinion.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

Appeal dismissed with costs.

Lords' Journals, March 29, 1912.

Solicitors for appellants: *Field, Emery, Roscoe & Medley, for L. C. Evans, Town Clerk, Salford.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for E. Parkes, Town Clerk, Eccles.*

[HOUSE OF LORDS.]

GUARDIANS OF HACKNEY UNION . . . APPELLANTS;

AND

KINGSTON-UPON-HULL INCORPORATION FOR THE POOR . . . . RESPONDENTS.

H. L. (E.)*

1912

May 9.

Poor Law—Settlement—Irremovability—Residence of Child under Sixteen with deserted Mother—Acquisition of Settlement under Sixteen—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 3—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A legitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its deserted mother who has become irremovable therefrom.

Decision of the Court of Appeal [1911] 1 K. B. 748, affirmed.

APPEAL by the guardians of Hackney Union from an order of the Court of Appeal, affirming an order of the Divisional Court. (1)

By an order of two justices of the peace for the county of London dated November 12, 1909, it was adjudged that the parish of Holy Trinity and St. Mary, in the Kingston-upon-Hull Incorporation for the Poor in the county borough of Kingston-upon-Hull, was the place of the last legal settlement of one Mabel Pelham, aged about twenty-three years, and her illegitimate child Albert Henry Pelham, aged about two years, paupers, then chargeable to the appellants. The respondents, the Kingston-upon-Hull Incorporation for the Poor, appealed to the quarter sessions for the county of London against the said order of justices, and, such appeal having been duly entered, afterwards by consent of the parties and by order of Scrutton J. a special case was stated for the opinion of the High Court of Justice.

Mabel Pelham was the lawful daughter of John Pelham and

* *Present:* EARL LOREBURN L.C., EARL OF HALSBURY, LORD MACNAGHTEN, and LORD ATKINSON.

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(1) [1911] 1 K. B. 748.

Maria Pelham and was born in the parish of Newhaven, Sussex, on April 13, 1886. John Pelham resided with his wife until the year 1888. He then deserted his wife and went to reside at Weymouth, where he remained until June, 1894. From the date of such desertion Maria Pelham continued to reside without interruption or relief in the parish of Newhaven with the pauper Mabel Pelham for upwards of one year thenceforward until about the year 1900, and by reason of the first year of such residence was rendered exempt from removal from the Newhaven Union in accordance with the provisions of 24 & 25 Vict. c. 55, s. 3, as amended by 29 & 30 Vict. c. 113, s. 17. At the time of the said desertion the pauper Mabel Pelham was residing in the parish of Newhaven with her mother, and she continued to reside there, without interruption or relief, for the term of three years and upwards, until the year 1900. In that year the pauper Mabel Pelham, who was then about fourteen years of age, left Newhaven and went to reside elsewhere at various places, but she had not since 1900 resided in any parish for a sufficient length of time to acquire a settlement. About the end of the year 1894 John Pelham went to reside within the area of the Kingston-upon-Hull Incorporation for the Poor, and he had continued to reside within that area ever since. At the time that his daughter, the pauper Mabel Pelham, attained the age of sixteen years, namely, on April 13, 1902, John Pelham was last legally settled in the parish of Holy Trinity and St. Mary in the Kingston-upon-Hull Incorporation for the Poor, having resided for the term of three years in that parish in accordance with the provisions of 39 & 40 Vict. c. 61, s. 34.

The question for the opinion of the Court was whether upon the facts stated in the special case, which were to the effect above set forth, the paupers Mabel Pelham and Albert Henry Pelham were settled in the parish of Holy Trinity and St. Mary in the Kingston-upon-Hull Incorporation for the Poor or not.

The Divisional Court (Lord Alverstone C.J. and Pickford J., Darling J. dissenting) held upon the authority of *West Ham Union* v. *Holbeach Union* (1) and *Fulham Parish* v. *Woolwich Union* (2) that the paupers were settled in the parish of Newhaven

(1) [1905] A. C. 450.

(2) [1907] A. C. 255.

and not in the parish of Holy Trinity and St. Mary in the Kingston-upon-Hull Incorporation for the Poor, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.).

1912. Feb. 1, 5. *Macmorran, K.C.*, and *Sydney Davey*, for the appellants. Sect. 34 of 39 & 40 Vict. c. 61 cannot be read literally without disregarding the provisions of s. 35, and the reasonable construction of those sections is to read s. 34 as subject to s. 35. (1) Upon that construction a legitimate child under sixteen takes the settlement of its father or widowed mother and cannot acquire a settlement of its own. That is the construction of the Act adopted by Lord Watson in *Reigate Union* v. *Croydon Union* (2) and by Lord Esher and Fry L.J. in *Mitford and Launditch Union* v. *Wayland Union*. (3) The Courts below considered themselves bound by the authority of *West Ham Union* v. *Holbeach Union* (4) and *Fulham Parish* v. *Woolwich Union* (5), but those were decisions upon illegitimate children and ought not to be extended to the case of a legitimate child. An illegitimate child under sixteen was always capable of acquiring a settlement in its own right, and it matters not whether a settlement is conferred upon it by irremovability or in any other way. On the other hand, before the Act of 1876, a legitimate child under sixteen could not acquire a settlement of its own, and s. 35 distinguishes between legitimate and illegitimate children. It is true that Lord Halsbury in *West Ham Union* v. *Holbeach Union* (1) treated it as following from *Highworth and Swindon Union* v. *Westbury-on-Severn Union* (2) that a legitimate child by residence under sixteen could acquire a settlement of its own, but Lord Macnaghten, though not dissenting, did not agree with that proposition and decided the case on other grounds. In *Fulham Parish* v. *Woolwich Union* (3) also the present Lord Chancellor treated s. 34 as applicable to legitimate as well as illegitimate children. But if a child under sixteen can obtain a settlement by residence it would follow that a wife could also, for the provisions of s. 34 apply to "any person" who has acquired a status of irremovability and s. 35 couples wives and children under sixteen together. There is no ground for distinguishing between the two cases. The question of irremovability in the case of a child under sixteen is regulated by s. 3 of 9 & 10 Vict. c. 66 and in the case of a wife by s. 1 of 11 & 12 Vict. c. 111; and by the latter Act a wife is irremovable if her husband is irremovable. But it has been held by this House that a wife though deserted cannot acquire an independent settlement of her own during her husband's lifetime: *Rutherglen Parish Council* v. *Glasgow Parish Council.* (4) That was a decision under the law of Scotland, but it was expressly stated by Lord Lindley that upon this point the law of England was the same. Under the previous legislation irremovability and settlement remained distinct and for many purposes they remain distinct still. Finally, the object of s. 35 of the Act of 1876 was that children and parents and husbands and wives should not be separated, and great hardship would result from allowing a child of three to acquire a settlement of its own. [They also referred to *Reg.* v. *Elvet* (5) and *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green.* (6)]

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(1) The Divided Parishes and Poor Law Amendment Act, 1876, provides:

Sect. 34. "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; . . . ."

Sect. 35. "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement. . . . ."

(2) (1889) 14 App. Cas. 465, 484.

(3) (1890) 25 Q. B. D. 164.

(4) [1905] A. C. 450.

(5) [1907] A. C. 255.

Rawlinson, K.C. (with him *Herbert Davey*), for the respondents. It is admitted that prima facie this pauper has acquired a settlement by residence by virtue of s. 3 of 9 & 10 Vict. c. 66 and s. 34 of 39 & 40 Vict. c. 61. The intention of the Act of 1876

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(1) [1905] A. C. 450.
(2) (1889) 14 App. Cas. 465.
(3) [1907] A. C. 255.
(4) [1902] A. C. 360, 379.
(5) (1859) 2 E. & E. 266.
(6) [1894] A. C. 230, 238.

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was to put an end to the expense occasioned by derivative settlements. Sect. 35 abolishes derivative settlements except in the case of a wife and a child under sixteen. The exceptions refer in general terms to the law as it existed at the time; and the section then proceeds to enact that a child under sixteen shall take the settlement of its father or widowed mother, i.e., a derivative settlement, and retain it until it acquires another settlement. That means "acquire at any time." There is no authority for saying that a child under sixteen cannot acquire a settlement by residence. It is said that before the Act a legitimate child under sixteen could never acquire a settlement, but that is not so. A legitimate child under sixteen could acquire a settlement by apprenticeship, and the old statutes are not repealed by this Act. The appellants' contention is that although the intention of the Legislature was to abolish derivative settlements, yet it has preserved them involuntarily in the case of a legitimate child up to the age of sixteen. This case is really concluded by *West Ham* v. *Holbeach Union* (1) and *Fulham Parish* v. *Woolwich Union.* (2)

[He was stopped.]

Macmorran, K.C., in reply, referred to Burn's Justice of the Peace, 30th ed., vol. iv., p. 341.

The House took time for consideration.

May 9. EARL LOREBURN L.C. My Lords, in this case Mabel Pelham lived with her mother in Newhaven for more than three years. Her father had long deserted the mother, and lived elsewhere. When she was fourteen years of age Mabel Pelham left Newhaven and no longer resided with her mother, but lived in other places, in no one of which, however, did she acquire a settlement. In these circumstances Mabel Pelham had acquired a status of irremovability at Newhaven at the age of fourteen years. She could not lawfully have been removed from Newhaven so long as she resided there with her mother. That is the effect of 9 & 10 Vict. c. 66, s. 3.

Again, Mabel Pelham, having so resided for three years under

(1) [1905] A. C. 450.

(2) [1907] A. C. 255.

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such circumstances in each of such years as would render her irremovable, comes distinctly within the 34th section of 39 & 40 Vict. c. 61. That section expressly provides that any person who has so resided in any parish shall be deemed to be settled therein until he (or she) shall acquire a settlement in some other parish by a like residence or otherwise. It follows that Mabel Pelham must be deemed to have been settled in Newhaven unless one of two things can be affirmed. Either it must be affirmed that this provision of s. 34 does not apply where the whole residence of three years takes place under the age of sixteen, or it must be affirmed that Mabel Pelham has, after she left Newhaven, acquired a settlement in some other parish by a like residence or otherwise.

Now it cannot be said that three years' residence under the age of sixteen is not sufficient to turn a status of irremovability into a settlement, because that was decided in *West Ham Union* v. *Holbeach Union*. (1) Lord Halsbury in that case treated the matter as already decided by the House of Lords, and as unalterable except by statute.

Can it then be affirmed that Mabel Pelham, after leaving Newhaven, acquired a settlement in some other parish by a like residence or otherwise? It is common ground that she did not acquire any other settlement by residence. Did she acquire it otherwise?

The only way in which it is suggested that she acquired a settlement after leaving Newhaven, otherwise than by residence, is that she did so by virtue of s. 35 of 39 & 40 Vict. c. 61. Sect. 35 of that Act, in abolishing derivative settlement, expressly provides that in the case of a legitimate child under the age of sixteen (and Mabel Pelham was a legitimate child) such child "shall take the settlement of its father or of its widowed mother as the case may be up to that age, and shall retain the settlement so taken until it shall acquire another."

Now whatever else may be said about this s. 35, it cannot be said that, under its provisions, Mabel Pelham, after leaving Newhaven, acquired a settlement in any other parish. A derivative settlement derived from the father is not a settlement which

(1) [1905] A. C. 450.

is acquired at all. It is derived. And even if Mabel Pelham can be said to have acquired it, she cannot be said to have acquired it after she had acquired the settlement under s. 34.

Accordingly, unless some other argument has to be considered, it seems to me clear that the 3rd section of 9 & 10 Vict. c. 66, together with the 34th section of 39 & 40 Vict. c. 61, have bestowed a settlement in Newhaven upon Mabel Pelham, because her status of irremovability has thereby been turned into a settlement, and she did not subsequently acquire any other.

But there is another argument dependent upon the same s. 35 of 39 & 40 Vict. c. 61 and treating it from a different point of view altogether. The argument is that a legitimate child under sixteen shall, until she is sixteen, take the father's settlement and retain it until she has acquired another. This is, in effect, to say that s. 35 overrides s. 34 of the same Act, and that the provision for irremovability being turned into settlement is not to apply to a legitimate child whose case is provided for by s. 35. It is said that s. 35 in terms applies to the case of Mabel Pelham, as well as s. 34 in terms applies to her, and that, therefore, one of the two must give way to the other.

Are these two sections, 34 and 35, really inconsistent with each other? I cannot perceive it, and I will take this case of Mabel Pelham as an illustration. While she was under sixteen she took the settlement of her father and retained it until she acquired another, that is s. 35. But then she did acquire another by virtue of s. 34, and is to be deemed settled therein until she acquires yet another settlement. If these sections are read attentively, they are surely plain enough.

I greatly regret that this view appears to be in conflict with the opinion of the Lord Chief Justice which I so much respect. But once admit that a child under sixteen can acquire a settlement under s. 34, which has been repeatedly decided, and the thing is simple.

Sect. 35 does not say the child is to retain the settlement of her father till she is sixteen, but that she is to take it up to that age and to retain it till she acquires another. All the time from her birth till she is sixteen she takes the settlement of her father, which may change from time to time, unless and until she acquires another.

I am very sorry that some of the learned judges found it hard to agree to what I said in *Fulham Parish* v. *Woolwich Union*.(1) It is true that case deals with an illegitimate child, and if I thought that any expressions of my own had gone too far I would readily say so. I think, however, that what I said was right in regard to children whether legitimate or illegitimate, and was in accordance with Lord Halsbury's earlier opinion. I was not thinking of a wife or of others than children, and the effect of those sections in regard to others than children had best be left for future consideration, for the simple reason that it is better to decide one thing at a time in view of the difficulties that arise as to the law of settlement. The use that was made in argument of Lord Watson's dicta makes me disposed to be cautious in generalizations.

Numerous hard cases were suggested as a consequence of adopting this view. If it resulted in manifest hardship or absurdity, no doubt a Court of law would prefer, where the language admits of it, the more reasonable construction. It was not, in my opinion, established in argument that the construction against which the appellants contend was unreasonable, and some of the illustrations offered at the Bar proved to be illusory. I do not, however, doubt that whatever construction is placed upon these Acts hard cases might follow, because, when circumstances of individuals differ so widely, almost any rule, and there must be some rule, may conceivably operate with harshness. The construction which has been adopted by this House seems to me the fair construction of the Acts as they stand, and flows from previous decisions.

I agree with the view expressed by several of the learned judges that a consolidation of the law upon this subject and a reconsideration of any unintended hardships that it may admit of would be very desirable. But your Lordships have now to

(1) [1907] A. C. 255.

decide this case, and it seems to me, as it did to the Courts below, that it is covered by authority.

EARL OF HALSBURY. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I concur.

LORD ATKINSON. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 9, 1912.

Solicitors for appellants: *Stones, Morris & Stone.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Robert H. Winter, Hull.*

[HOUSE OF LORDS.]

H. L. (E.)*
1912
March 4.

ECCLES PROVIDENT INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED . . } APPELLANTS;

AND

GRIFFITHS . . . . RESPONDENT.

Industrial and Provident Society—Member—Nomination—Limitation of Amount, to what Date referable—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 25, *sub-s.* 1.

The Industrial and Provident Societies Act, 1893, s. 25, sub-s. 1, empowers a member of a society registered under that Act to nominate any person to whom his property in the society shall be transferred at his decease "provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling":—

Held (Lord Shaw of Dunfermline dissenting), that the word "then" referred to the date of the nomination and not to the date of the nominator's decease, and that the power of nomination related only to property in the society existing at the time of the nomination.

Held, therefore, that a nomination made by a member in respect of all his property in the society at a time when the amount credited to him in the books of the society did not exceed 100*l*. was good as to the amount then standing to his credit, notwithstanding that the amount so credited to him at his decease exceeded 100*l*.

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* *Present:* EARL LOREBURN, L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

Decision of the Court of Appeal [1911] 2 K. B. 275, affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Avory J. (1)

The appellants were a society registered under the Industrial and Provident Societies Act, 1893, and the respondent was the nominee of one James Parry, a member of the appellant society, under a nomination pursuant to s. 25 of the Act.

On April 1, 1909, Parry, by a writing under his hand duly delivered at the registered office of the society, nominated the respondent, who was his son-in-law, as the person to whom all his property in the society, whether in shares, loans, or deposits, should be transferred at his decease. This nomination was never revoked or varied. On February 3, 1910, Parry died, having in 1896 made a will disposing of his whole property. At the date of the nomination the amount standing to Parry's credit in the books of the society did not exceed 100*l*., being 98*l*. 13*s*., but at the date of his death the amount so standing to his credit did exceed 100*l*., being 103*l*. 6*s*. 7*d*. The difference between these two sums was due to interest which had accrued on Parry's property in the society since the date of the nomination and had not been withdrawn by him.

The action was brought by the respondent to obtain a transfer to him by the appellants of the property comprised in the nomination. The defence was that as the sum standing to the credit of the nominator at the date of his death exceeded 100*l*., the nomination was invalid under the proviso in sub-s. 1 of s. 25 of the Industrial and Provident Societies Act, 1893. (2)

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(1) [1911] 2 K. B. 275.

(2) Sect. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, provides as follows: "A member of a registered society, not being under the age of sixteen years, may, by a writing under his hand, delivered at or sent to the registered office of the society during the lifetime of such member, or made in any book kept thereat, nominate any person or persons other than an officer or servant of the society (unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator) to or among whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such

Avory J., following *In the Goods of Baxter* (1), held that the word "then" in the proviso referred to the date of the nomination and not to the date of the nominator's decease, and consequently that the nomination was valid, and his decision was affirmed by the Court of Appeal (Vaughan Williams and Kennedy L.JJ., Farwell L.J. dissenting).

1911. Nov. 10. *Danckwerts, K.C.* (*E. C. Burgis* with him), for the appellants. Sect. 25, sub-s. 1, of the Industrial and Provident Societies Act, 1893, empowers a member to nominate a person to whom his property in the society shall be transferred at his decease provided the amount credited to him in the books of the society does not "then" exceed 100*l*. The nomination is to take effect at death, and that is the period to which the word "then" refers. This construction receives support from s. 27, which provides that in the event of a member entitled to property in the society not exceeding at his death 100*l*. dying intestate, without having made any nomination thereof then subsisting, the committee may without letters of administration distribute the same among the persons entitled by law to receive it. To understand the scheme of the Legislature these sections must be read in connection with the enactment which exempts probates and letters of administration from duty where the effects of the deceased do not exceed 100*l*. That was first enacted by the Revenue (No. 2) Act, 1864 (27 & 28 Vict. c. 56), s. 5; it was then re-enacted with an immaterial variation by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 27; and that was again kept alive, in effect, by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8. Read in conjunction with those provisions the intention of the Legislature in ss. 25—27 was, without the formality of probate or letters of administration, to provide for members of a provident and industrial society registered under the Act a cheap and easy method of disposing of their

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nomination, if the nomination does not comprise the whole, shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling."

(1) [1903] P. 12.

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property in the society to the extent of the exemption. If such property exceeds 100*l.* at the death of the member probate or letters of administration must be taken out, otherwise not; and, if at the date of his death his property in the society does not exceed 100*l.*, it is immaterial that it may have exceeded that amount at the date of the nomination.

[EARL LOREBURN L.C. The power of nomination, subject to the limitation as to amount, may co-exist with the possession by the member of property outside the society, the whole of which would be liable to duty.]

The word "then," which did not appear in the corresponding provision in the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 11, sub-s. 5, was inserted for the purpose of removing a possible ambiguity under the former provision and making it quite clear that the time intended to be referred to was the time of the member's decease. It is submitted that even without the word "then" the effect was the same, and the preamble of the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), which by s. 3 enlarged the limitation from 50*l.* to 100*l.*, assumes that the limitation is referable to the death of the member. Grammatically the word "then" refers to the immediate antecedent "at his decease"; the nomination, like a will, only affects property existing at the death; and the limitation is intended to refer to the property upon which the nomination operates. If "then" is construed as referring to the time of nomination, it would follow that if the member's property in the society at that time did not exceed 100*l.*, whatever at the time of his death might be the amount of his property in the society, it would pass by the nomination, and the effect of that construction would be to enable a member to avail himself of this inexpensive method of disposition in a case which could not have been contemplated by the Legislature.

The dictum of Gorell Barnes J. in *In the Goods of Baxter* (1), upon which the Courts below relied, was obiter only, because in that case there was an excess over 100*l.* at both periods. *Bennett* v. *Slater* (2) was a decision under a different Act (the Friendly

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(1) [1903] P. 12.

(2) [1899] 1 Q. B. 45.

Societies Act, 1875, s. 15, sub-s. 3) differently worded and applicable to a different class of society.

F. W. Roe Rycroft (*Jessel Rycroft* with him), for the respondent. The word "then" in s. 25, sub-s. 1, must refer to the time of nomination, and the nomination applies only to property in existence at the time. This is clear from the words "or so much thereof as is specified in such nomination." Therefore no such difficulty as is suggested by the appellants would arise from construing the word "then" as referable to the time of nomination. Sect. 27 is necessarily limited to the time of death and no argument can be founded on it. Under s. 11, sub-s. 5, of the Act of 1876 it is submitted that the limitation clearly referred to the time of nomination. The Act of 1893 is primarily a consolidating Act, and the insertion of the word "then" cannot have been intended to effect a change of policy. The nomination operates as a voluntary settlement with a power of revocation by a similar instrument: *Bennett* v. *Slater*. (1)

Danckwerts, K.C., in reply. There is nothing in the Act to shew that the nomination is limited to property existing at that date.

The House took time for consideration.

1912. March 4. EARL LOREBURN L.C. My Lords, I will not enter upon the argument of this case because my noble and learned friends have done so, but in my opinion the order of the Court of Appeal ought to be affirmed.

LORD MERSEY. My Lords, the question in this case is whether the word "then" as used in the last line of sub-s. 1 of s. 25 of 56 & 57 Vict. c. 39 refers to the date of the nomination mentioned in the section, or to the date of the death of the nominator. Avory J., who tried the case, and Vaughan Williams and Kennedy L.JJ., who heard it on appeal, were of opinion that the word referred to the date of the nomination, whereas Farwell L.J. thought it referred to the date of the death.

I think that the opinion of the majority in the Court of Appeal was right, and that the judgment pronounced in accordance with it ought to stand.

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(1) [1899] 1 Q. B. 45.

Divesting the sub-section of those words which, for the purpose in hand, may be regarded as surplusage, it reads as follows:—"A member may, by writing under his hand, sent to the registered office during the lifetime of such member, or made in any book kept thereat, nominate any person to whom his property in the society, or so much thereof as is specified in such nomination, shall be transferred at his decease," and then comes a proviso, the words of which have given rise to the present dispute, "provided the amount credited to him in the books of the society does not then exceed one hundred pounds." Sub-s. 2 of s. 25 enacts that a nomination so made may be revoked or varied by any similar document, but shall not be revocable or variable by will; and sub-s. 3 directs that the society shall keep a book wherein the names of all persons so nominated, and of all revocations or variations, shall be regularly entered.

Before considering the effect of the enabling part of the first sub-section of this section, and of the proviso, it is, I think, desirable to draw attention to the next section of the Act of Parliament. Sect. 26 directs that "on receiving satisfactory proof of the death of the nominator, the committee of the society shall transfer the property comprised in the nomination in manner directed by it."

Turning now to the first sub-section of s. 25, the first question which arises is, what property does it enable the member to deal with? It appears to me that the words, "his property in the society," make the answer quite plain. The only property he has when he signs the nomination paper is the property then standing to his credit in the society's books, and it is in respect of that property, and that only, that he can nominate. The enactment does not say that the member may nominate a person to whom any property which he may have in the society at his death shall be transferred; it is dealing with existing property and with nothing else. The later words, "or so much thereof as is specified," are hardly applicable to a future unascertained amount which may itself turn out at the date of the death to be less than the part specified. It is difficult to understand how a part of a problematical amount can be "specified" at all.

Then, again, by sub-s. 2 the name of the person nominated is to be entered in a book of the society, and inasmuch as the nomination may be as to the whole or any part of the member's property, presumably the amount is to be recorded with the name. It is difficult to understand how the secretary or other officer of the society is to record a nomination of a part of an amount which does not stand, and for that matter may never stand, to the credit of the member at all. Apply these observations to the present case. The member had to his credit at the date of the nomination 98*l.* 13*s.* Acting under the enabling part of the section, he nominated the plaintiff as the person to whom the whole of his property should be transferred at his death. Can it be supposed that he had in his mind at the time of the nomination any other property than that which he then had, or can it be supposed that the Legislature intended to enable him to nominate in respect of non-existing property? I think clearly not, and if this be the right view of the effect of the enabling part of the sub-section, the difficulty which is said to stand in the way of the interpretation put upon the proviso by Avory J. and the majority of the members of the Court of Appeal disappears. That difficulty is that if the word "then" in the proviso is to be read as meaning at the date of the nomination, a member who has at that time, say, 1*l.* or any other sum not exceeding 100*l.* to his credit can avail himself of the enabling part of the section to pass to a nominee any amount, however large, which may happen to stand to his credit at his death. According to the view I take, this difficulty cannot arise, for the statute only enables the member to deal with what he has; it gives him no power to deal with what he has not.

There remains to be considered the proviso. The proviso is a restriction upon some act, and there are only two acts to which it can possibly apply, either the act of the member in nominating or the act of the committee in transferring. But s. 26, which creates the obligation to transfer, enacts that the committee shall transfer in manner directed by the nomination. Under this section the committee have no choice; they cannot escape the obligation to transfer by consulting the books to see whether more or less than 100*l.* stands to the credit of the

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deceased member. I think, therefore, that the proviso does not affect the obligation of the committee to transfer. Consequently it must restrict the power of the member to nominate by limiting that power to cases in which the member has to his credit not more than 100*l.* In other words, the proviso is intended to limit the right of the member to nominate and not to affect the obligation of the committee to transfer. It follows that the word "then" relates to the date of the nomination.

The object of s. 25 is, in my view, to give to the poorer members of a society, that is to say, to those who have not more than 100*l.* to their credit, the power to make provision for the disposal, at their death, of this small sum without the expense being incurred of the making of a will or of administering this part of their estate. The nomination can only be made by the members who are within this poorer class, and it is the duty of the secretary of the society, before he enters the name of the nominee in the society's book, to see that there is not more than 100*l.* to the member's credit. If the exercise of the right to nominate is delayed until the amount to the credit is more than 100*l.* the right itself is lost. Once made the nomination takes effect, not by creating any charge or trust in favour of the nominee as against the nominator, as was suggested during the argument (for the nominator can at any moment revoke the nomination), but by giving to the nominee a right as against the society, in the event of the death of the member without having revoked the nomination, to require the society to transfer the property in accordance with the nomination. Until death the property is the property of the member, and all benefits accruing in respect of it during his lifetime are his also. The view contended for by the appellants would make the nomination defeasible not merely by the statutory revocation provided for the purpose, but by possible future and uncertain events, such as payments by the member or credits by the society of sums to the member's account, having the effect of increasing the total to his credit at his death to a sum over 100*l.*

The construction which I put on the Act of Parliament will, if it prevails, give effect to the object which, in my opinion, the Legislature had in view, and will render the nomination in this case an effective document instead of making it, as the appellants would have it, a piece of waste-paper.

As to the 4*l*. 13*s*. 7*d*., being the difference between the 98*l*. 13*s*. to the member's credit at the date of the nomination and the 103*l*. 6*s*. 7*d*. to his credit at his death, it may be that that small sum falls into the estate of the deceased and does not pass to the respondent, or it may be that to the extent to which it is an accretion in respect of the capital sum it follows the destination of the nomination; but, inasmuch as counsel informed your Lordships that the matter was of no importance, I have not dealt with it. Nor have I dealt with the earlier statute or with the rules or forms in force in relation to the present statute. None of them can, in my opinion, be allowed to affect the construction to be put upon the words of the Legislature.

LORD ATKINSON. My Lords, in my view the paramount purpose of the framers of the 25th and 27th sections of the Industrial and Provident Societies Act of 1893 was, first, in the case of a member of one of such societies dying intestate without leaving behind him unrevoked a nomination such as is mentioned in the statute, to permit his interest in his society, not exceeding 100*l*. in value, to pass to his next of kin without the necessity of taking out letters of administration; and, secondly, in the case of a member dying whether testate or intestate leaving behind him such a nomination unrevoked, to permit the property mentioned in the nomination, provided it did not exceed 100*l*. in value, to pass to the nominee without, so far as it was concerned, the necessity of taking out probate or letters of administration. The property of the deceased in the society up to the limit mentioned was to pass to the beneficiaries in each case without paying toll to the State, if it may be so called.

This paramount purpose can be effectuated in the latter case in either of two ways, namely, first, by holding that the word "then" used in s. 25, sub-s. 1, refers to the date of the member's death, or, secondly, by holding that the word "then" refers to the date of the nomination, provided only that in the latter case the nomination is to be taken as having the effect of earmarking or setting apart the property mentioned in it to serve its purposes—to feed the gift made by it. On any other hypothesis the reference of the word "then" to the date of the nomination would render the limitation to the sum of 100*l.* quite meaningless and futile. The limit would serve no rational purpose if it enabled a member who happened at the date of the nomination to have an interest in the society not exceeding 100*l.* in value to execute a nomination which would at his death carry twice that sum to his nominee. I could not concur in any construction of the statute which would lead to such irrational results. I inclined myself during the argument to the opinion that the point of time indicated by the word "then" was in the 25th as in the 27th section the date of the member's death; but as the construction Lord Mersey puts upon the 25th section of the statute, based as I understand it to be on the assumption that the property mentioned in the nomination is set aside to serve the purposes of the nomination, carries out what I conceive to be the primary purpose of the Legislature, I am not so confident in my own opinion as to induce me to differ from him, and I therefore adopt his view and concur in the judgment he has just delivered.

I wish especially to point out that this judgment will inflict no inconvenience of any appreciable kind upon any member of a society, inasmuch as, although it ties up the funds temporarily while the nomination is in force, it would be always competent for him, by a most easy and inexpensive process, to revoke the nomination, deal with the funds as he pleases, and, if he so desires, renominate.

LORD SHAW OF DUNFERMLINE. My Lords, the late James Parry was a member of the appellants' society, which is registered under the Industrial and Provident Societies Act, 1893. On April 1, 1909, he nominated the respondent, his son-in-law, as the person to whom "shall be transferred my property in the society, whether in shares, loans, or deposits, at my decease." I have here quoted the words of the nomination. At the date of this document the amount of his credit in the society's books was under 100*l.*; at the date of his decease it was over 100*l.* Mr. Parry also made a will, disposing of his whole property.

Stating it thus, the problem is reduced to its simplest elements in fact. That problem is: Is the destination of Mr. Parry's funds with the society governed by the nomination or by the will?

The solution of the problem depends upon the construction to be given to s. 25 of the Industrial and Provident Societies Act, 1893. That section provides that "a member . . . . may" in writing "nominate any person . . . . to . . . . whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such nomination, if the nomination does not comprise the whole, shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling." There are further provisions made for the revocation or variation by a similar document of the nomination, and by sub-s. 3 it is provided that "the society shall keep a book wherein the names of all persons so nominated, and of all revocations or variations, if any, of such nominations, shall be regularly entered. And the property comprised in any such nomination shall be payable or transferable to the nominees." The question of construction involves the determination of what is the point of time at which the amount with the society is to be reckoned. If at that point it is under or over 100*l.*, then the nomination or will respectively shall regulate its disposal.

My Lords, I think that the argument of Mr. Danckwerts was sound, to the effect that it is not illegitimate to view the scheme of this statute as one which fits in with the general scheme of legislation for the disposal in this country of small estates at death. It is not disputed that if estates, by which I mean what is in bonis of a citizen at the time of his decease, do not exceed 100*l.*, then in such cases the expense and formalities of probate and the payment of duty are avoided. It is accordingly clear that the legislation with regard to the industrial and provident societies and the Inland Revenue legislation would be worked without either hiatus or overlapping, if the date of the decease was taken as the point of time when the calculation of the figure governed by the nomination is to be made. Such a consideration, however, my Lords, while legitimate, is not entirely conclusive, and is all the less so because in a certain aspect the point of public convenience may prove in a matter of construction rather a temptation than a guide. On the other hand, one cannot peruse the opinions of the learned judges of the Court below without feeling how evenly balanced are the scales which incline on this sub-section to the one construction or the other, and I think it is just in such a case that a view as to the general scheme of legislation is not out of place.

But, my Lords, it humbly appears to me that some assistance is obtained on this subject by rule 12 of the appellants' society, which deals with the subject of nomination by members. This is one of a body of rules made up in terms of the statute, and it provides: "(12.) The secretary shall keep a book in which he shall register or record all nominations made by members of any person . . . . to whom such nominator's shares (the term 'shares' including for the purposes of this rule loans and deposits) shall be transferred at his decease, provided that the amount credited to him in the books of the society does not exceed 100*l.*" My Lords, I do not consider it to be doubtful that that proviso as to the amount credited to the member not exceeding 100*l.* is clearly a proviso applicable to the time of transfer, and the time of transfer is to be the decease of the member. The rule appears to me quite plainly to stipulate that the nomination shall be effective for the purposes of transfer as at the date of the member's death, if at that date the amount credited to him does not exceed 100*l.* I now put that alongside of the nomination of Mr. Parry in this case, which was in favour of his son-in-law, in the language quoted, namely, "to whom shall be transferred my property in the society, whether in shares, loans, or deposits, at my decease." It accordingly would appear that both the society, upon the one hand, and its member, Mr. Parry, upon the other, accepted the situation that the nomination governed the state of affairs at the date of the latter's death, if at that date his property with the society did not exceed 100*l.*

All this, however, my Lords, although it also dovetails with the scheme of general legislation, would still not be conclusive on a construction of the language of s. 25 itself. After repeated consideration, I am of opinion that the construction put upon that section by the learned Lord Justice Farwell is correct. He says, "I cannot come to the conclusion that the word 'then' in the section means anything but 'at his decease,' and therefore I think that the nomination in this case must fail for that reason." When this section stipulates that a member may nominate the person to whom his property "shall be transferred at his decease, provided the amount credited to him in the books of the society does not then exceed 100*l.* sterling," it does not appear to me, with the greatest respect to the learned Lord Justice Vaughan Williams, to be legitimate to cite the section with the omission of those words, "to whom his property . . . . shall be transferred at his decease," and so to be able to read back the date to that of the nomination itself. By this process of omission, of course, a solution becomes easy, but the words omitted, my Lords, appear to me to be the words which are crucial. The nomination of a person to whom the shares, &c., "shall be transferred at his decease, provided that the amount credited . . . . does not then exceed one hundred pounds," appears to me to fix the point of time—"then"—as the death of the shareholder. The subject does not admit of elaboration, but I am glad to think that this construction, which indeed I regard as the only legitimate one, is one which manifestly squares with the construction put upon their rights by the society and shareholders themselves, and also with the general legislative scheme as to small estates to which I have alluded. I entertain great apprehensions as to the disturbance of this construction and this scheme, and as to the hindrance to the simple operations of payment and withdrawal, if the effect of a nomination be to attach particular funds and prevent members or depositors dealing freely with their means unless after execution at each transaction of revocations or fresh nominations. In the view which I take I do not think that the provisions of this statute warrant such results.

It is with real regret and much diffidence that I find myself out of agreement with my noble and learned friends whose judgments have just been read. But I am humbly of opinion that the judgments of the Courts below should be reversed,

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and that the suit at the instance of the executors should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 4, 1912.

Solicitors for appellants: *Bower, Cotton & Bower, for Aston, Harwood & Somers, Manchester.*

Solicitors for respondent: *Braikenridge & Edwards, for H. Gilman Jones, Salford.*

[HOUSE OF LORDS.]

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BALL (PAUPER) . . . . APPELLANT;

AND

WILLIAM HUNT & SONS, LIMITED . . . RESPONDENTS.

Employer and Workman—Compensation—Incapacity for Work—Disfigurement—Inability to get Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I., pars.* 1 (*b*), 3.

The provisions of the First Schedule to the Workmen's Compensation Act, 1906, as to the scale and conditions of compensation do not cut down the right to compensation conferred by s. 1, sub-s. 1, of the Act.

"Incapacity for work" in paragraph 1 (*b*) of the First Schedule means loss or diminution of wage-earning capacity and includes inability to get work as the result of the injury which the workman has sustained.

A workman lost the sight of his left eye through an accident, but continued to work at his old rate of wages. Many years afterwards he met with a second accident to his left eye which necessitated its removal. On his recovery from the operation he was unable to obtain work in his employment in consequence of his being manifestly a one-eyed man, though his ability to work remained exactly as it was before:—

Held, that he was entitled to compensation.

Decision of the Court of Appeal [1911] 1 K. B. 1048, reversed.

WORKMAN'S appeal from an order of the Court of Appeal affirming an award of the judge of the West Bromwich County Court under the Workmen's Compensation Act, 1906.

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

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Some fifteen years before the accident which was the subject of the arbitration the appellant, an edge tool moulder, met with an accident through a piece of steel striking his left eye with the result that three years afterwards that eye became blind; but it was not removed and to all outward appearances his eyes were normal. For twelve years preceding the second accident he had worked at his trade of an edge tool moulder with only one available eye and had earned his old rate of wages.

On September 5, 1910, the appellant entered the respondents' employment, and on September 7, whilst he was cutting out some brickwork preparatory to fixing a hammer a piece of brick flew up and struck his left eye and set up so much inflammation that the eye had to be removed. Compensation at the rate of 10*s.* a week, being 50 per cent. of his average weekly earnings, was paid for ten weeks until the socket was healed, but no longer. The appellant then applied for employment both to the respondents, his former employers, and to several other firms, but they all refused to employ him on account of the fact that he had only one eye. He then filed a request for arbitration, claiming compensation on the footing that he was unable to obtain employment and was totally incapacitated by the accident for work as an edge tool moulder.

The county court judge found in favour of the applicant that he had not full capacity to do the work of an edge tool moulder, but that such incapacity was not caused by the accident in September, 1910, but by the previous accident. In the opinion of the county court judge the applicant's contention that the disfigurement caused by the accident in September caused the incapacity, inasmuch as employers when they could see that he was a one-eyed man would not employ him in his trade, could not prevail, although he found that the accident resulted in the removal of the eye and the consequent disfigurement. He therefore made an award in favour of the respondents, and this award was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., Fletcher Moulton L.J. dissenting).

1912. Feb. 29, March 1. *Acland, K.C.*, and *Edward Cave*, for the appellant. The appellant has sustained an injury by accident arising out of and in the course of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906; he is therefore entitled to compensation, subject only to the question of amount, which is regulated by paragraph 1 (*b*) of the First Schedule. That clause fixes the quantum of compensation "where total or partial incapacity for work results from the injury." "Incapacity for work" there means incapacity for working as a workman for wages. If either there is a loss of power to get work or inability to do work as the result of the injury the man is incapacitated. "Incapacity for work" is equivalent to loss of earning power and is not confined to physical incapacity, though it includes it. The test is, Is the man left by the accident in such a state that he cannot get work in the market? The Courts below have treated incapacity for work as equivalent merely to inability to work, but that is not right as an exclusive definition. The true meaning of the term is stated by Collins M.R. in *Clark* v. *Gas Light and Coke Co.* (1) *Martin* v. *Barnett* (2), which was a decision in favour of the workman, is precisely in point.

W. Shakespeare, for the respondents. Where an accident prevents a man from getting employment by making known a physical defect which existed before, that is not a ground for compensation. The injury must be something which interferes with his fitness for work. Sched. I. is not confined to quantum, but relates to the "scale and conditions of compensation." It determines when the workman shall have compensation and how much he shall have. Ordinarily capacity for work means ability to do work and has nothing to do with the opportunity of getting it. Wage-earning comes to be considered only when the incapacity for work as a consequence of the accident is proved to exist: see Sched. I., paragraph 1 (*b*) and paragraph 3. You must first prove the incapacity. Take the case of a stevedore who has a fit and falls down the hold of a ship. He is paid compensation and completely recovers, but cannot get work because it becomes known to the employers that he is a man liable to fits. That is not a ground for compensation. To entitle a workman to compensation the Act requires two things, first that his capacity for work and secondly that his ability to earn should be affected by the accident. The two terms are intended to be

(1) (1905) 21 Times L. R. 184.

(2) (1910) 3 B. W. C. C. 146.

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distinguished. "Capacity for work" means ability to perform work in a reasonable way. "Ability to earn" includes the opportunity of getting work. This is not an incapacity resulting from the injury. The eye was absolutely sightless before the accident. This is not a case in which a good appearance is one of the qualifications for work, as it would be, for example, in the case of a butler or parlourmaid. Compensation is given for personal injury, not for the disclosure of an antecedent incapacity. The meaning of the Act is that so long as any of a man's working qualifications are affected by the accident, then he is entitled to compensation for his inability to earn, but not otherwise.

Acland, K.C., replied.

The House took time for consideration.

May 13. EARL LOREBURN L.C. My Lords, in this case the appellant was already blind of one eye when in September, 1910, the blind eye was again injured by an accident in the course of his work and had to be removed. The result is alleged to have been that his disfigurement prevented his obtaining employment. He remained equally able to do work after as he was before September, 1910, but says that his partial blindness became apparent as it had not been before, and so he could get no work. Can it be said that incapacity for work resulted from the injury of September, 1910? The injury did not prevent him from being able to work, but it did reduce him to a physical condition which prevented him from getting work suitable in the circumstances.

In my opinion, if the county court judge thinks these facts are established (as I gather he did think) he ought to award compensation on the footing of total or partial incapacity, according as he may find. By the first section of the Workmen's Compensation Act compensation is to be paid for personal injury by accident within the terms of the Act. What the schedule does is to fix the scale and conditions. In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. I think this view is in accordance with previous decisions of the Court of Appeal. The principle is carefully discussed in *Cardiff Corporation* v. *Hall.* (1) And certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury. In my opinion this case should be remitted to the learned county court judge.

LORD MACNAGHTEN. My Lords, I am unable to agree in the conclusion at which the Court of Appeal has arrived, and I must add with all respect that the process by which the learned judges who formed the majority of the Court arrived at that conclusion has not been regarded with much favour in this House.

Both the Master of the Rolls and Buckley L.J. turn to the First Schedule. Finding there the expression "total or partial incapacity for work" they hold that it is an answer to the present claim to say that the claimant's physical condition is just what it was before the accident happened, and that his dexterity and capacity for manual labour are as good as ever. "Incapacity for work" they take to be the same as "incapacity to work." In fact one of the learned judges treats the two expressions as synonymous and uses them as convertible terms. Now "incapacity for work" as the phrase is used in the schedule seems to me to be a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident. But whether that be so or not, it is laid down most distinctly in this House (*Lysons* v. *Andrew Knowles & Sons, Ld.* (2)) that you must not resort to the schedule for the purpose of cutting down the right to compensation. The right to compensation is given by the Act. The Act is the workmen's charter. The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the Legislature is not to be looked for there.

(1) [1911] 1 K. B. 1009.

(2) [1901] A. C. 79.

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As Lord Halsbury observed in the case I have just mentioned, "the first thing one has to do is to apply one's mind to what is the substantive intention and meaning of the statute." It seems to me that the injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident. At that time this man was earning 20*s.* a week as an edge tool moulder. That is what he was worth then. What is he worth now? As he is now no one will take him on at that work. Everybody would say offhand two eyes are better than one for such a job as that. So he is heavily handicapped in seeking employment. This disadvantage or disqualification, whatever you choose to call it, has resulted from the accident. It is (to use another expression to be found in the Act) "due to the accident."

It seems to me therefore that this workman is entitled to claim compensation under the Act. With the amount of compensation, if compensation be awarded, we have nothing to do. That is a matter for the arbitrator or the county court judge.

I agree that the appeal should be allowed and the case remitted to the proper tribunal.

LORD ATKINSON. My Lords, in this case the workman, through an accident arising out of and in the course of his employment, lost his eye. It was a blind eye, no doubt; but it is impossible to contend, I think, that the loss of even a blind eye is not an injury within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act of 1906. His employer was therefore liable to pay him compensation under the provisions of that section. That is the workman's absolute right. Before the accident he was, though blind of one eye, physically able to do the work he was then doing, and is still able to do work of that kind. There was a market for his labour then because his blindness was not observable. There is no market for his labour now because his blindness is observable. The recent accident has destroyed his market, though it has left his physical ability to work what it was before.

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Before the later accident he was not suffering under any incapacity whatever. He was able to work and able to get employment, and I cannot see how the words "antecedent incapacity" apply to the appellant's case. Though the first section of the statute plainly confers upon an injured workman the right, in cases coming within it, to obtain compensation, it does not fix the amount of compensation, or indicate the principle upon which the compensation is to be measured; that is the function of the schedule, but it is its only function. The employer is by s. 1, as he was by s. 1 of the Workmen's Compensation Act of 1897, made liable to pay compensation "in accordance with the schedule," elastic words importing in themselves a degree of latitude which it is difficult to define: *Thomas* v. *Kelly*. (1)

The argument for the respondents resolves itself into this: as paragraph 1 of the schedule only provides for the payment of compensation in two cases—(*a*) where the death of the workman results from the injury, and (*b*) where total or partial incapacity for work results from it—the workman in the present case cannot get any compensation because he is as able physically to do his work as he ever was, though no one will employ him to do it. In other words, that in construing the words "incapacity for work," used in the schedule, the absence of a market for the workman's labour, though due, not to the state of the labour market nor to fluctuations of trade, but to some defect personal to himself caused by the injury he has received which renders his labour unsaleable, is to be entirely left out of consideration. His power of earning wages may be completely gone, yet for the loss of that power, directly resulting from the disfigurement caused by the accident, he is not to receive any compensation. Such a construction as this, it would appear to me, cuts down the right expressly conferred upon the workman by the statute. It involves a repeal pro tanto of s. 1.

The question whether a schedule such as this can legitimately be construed in such a way as to cut down the right conferred by the statute was considered in your Lordships' House in the case of *Lysons* v. *Andrew Knowles & Sons, Ld.* (2) In that case Lysons, the workman, a miner, entered the respondents' employment on

(1) (1888) 13 App. Cas. 506, at p. 511.

(2) [1901] A. C. 79.

a Tuesday, on which day in each week the miners' week in the respondents' colliery ended. He worked piecework on that day and on the Thursday following, earning 6*s*. each day. He was then injured by an accident, giving a right to compensation under the first section of the Act of 1897, which is practically identical with the first section of the present Act.

The county court judge held that the workman had earned 12*s*. during one week, and that he was therefore entitled, under paragraph 1 (*b*) of the schedule to that Act, to 50 per cent. of his average weekly earnings, i.e., 50 per cent. of 12*s*., or 6*s*. per week for every week during which his disablement lasted after the last fortnight. The words of the clause are "not exceeding 50 per cent. of his average weekly earnings during the previous twelve months." The Court of Appeal held that Lysons was not entitled to any compensation, as he had not been employed for over two weeks. This construction plainly cut down the right conferred upon the workman by the statute, and was for that very reason disapproved of and rejected in this House. At p. 85 of the report Lord Halsbury, then Lord Chancellor, is reported to have said: "The first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute. Does it mean that every workman, who is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now in debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are to be paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all? My Lords, for my own part I cannot entertain a doubt that the Legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the Legislature if that was the meaning of the enactment. But now it is said that the language of the enactment is that the employer is to 'be liable to pay compensation in accordance with the First Schedule of this Act.' It is to be observed that even upon that language it

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is not such compensation as is enacted in the schedule, but 'in accordance with the First Schedule to this Act'; and when we look at the First Schedule of the Act we find that there are a variety of provisions which are very intelligible indeed, if we take what I say is the leading enactment, that every workman is entitled to compensation. But it is said: if a workman is not employed for at least two weeks, how can you average his earnings, or his agreed earnings, by an 'average,' which, when you have only got one term, is an impossible phrase? Well, my Lords, for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that by arbitration, or by some other means, which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be."

Lords Macnaghten, Davey, Shand, Robertson, and Lindley gave judgment to the like effect, and Lord Brampton concurred.

On examining the schedule one plainly sees that what is to be compensated for is not, as in ordinary actions of tort, the pain and suffering which the plaintiff has endured, or the disfigurement of, or injury to, his body which has been inflicted upon him, but the loss of the power to earn wages which has resulted from the injury. In the case of the workman's death it is only those dependants who are dependent wholly or in part upon those earnings who are to receive any compensation, and the amount of it is, subject to certain limits, measured by the amount of those earnings in the employment in which he met with the accident which caused his death. However great may be the pecuniary loss the dependants sustain from the workman's death by reason of the cessation on that event of a pension, or life annuity, or income from property, they are not entitled to any compensation under the Act in respect of this loss.

The obvious meaning of paragraph 1 (*b*) of the schedule, when read with paragraph 3, is that the higher scale is to be adopted when the workman is not able to earn anything, and that where he does earn or is able to earn something in a suitable employment credit is to be allowed for this sum to the extent specified. The words "or is able to earn" are most significant. They point to the retention of the power to earn something in a suitable employment, and to the extent that this power is retained or has returned, though he may not try to exercise it, he does not incur the particular kind of loss for which compensation is to be given. Paragraph 16 of the schedule points in the same direction. The weekly payment may be ended or diminished or increased according, presumably, as the ability to earn has completely returned, has increased, or has diminished. There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be earned so much the basis of compensation, if the market for the workman's labour has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work. If because of his apparent physical defects no one will employ him, however efficient he may be in fact, he has lost the power to earn wages as completely as if he was paralysed in every limb.

If it be then the paramount object of the Act to compensate for the loss of the power to earn wages, the workman whom because of the injury caused by an accident, nobody will employ, comes within its purview as much as one who is rendered unable to do any work at all.

I am unable to follow the line of reasoning based upon the antecedent existence of the man's blindness. It was not apparent, and, as the result shews, he got employment because it was not apparent. The employers, possibly because they think the loss of the workman's vision, which is now obvious, will render him more liable to accident, refuse to employ him.

It may well be that the words "incapacity for work" would not, in their ordinary meaning, prima facie apply to a case such as this, but it has been well established that in the construction of a statute it is perfectly legitimate to give to some of its words a meaning different from their ordinary meaning where that is necessary to forward and effect the main purpose and object of the enactment.

I therefore concur that the matter should be remitted to the county court judge to ascertain the amount of compensation.

LORD SHAW OF DUNFERMLINE. My Lords, I think this case is an important one, but its material facts can be stated in a word. About fifteen years ago the appellant, who is an edge tool moulder, suffered an injury to his left eye, the ball of which was penetrated by a steel chip. This accident resulted in the blindness of that eye, but did not produce any disfigurement in the workman's appearance, which remained unchanged. On September 7, 1910, however, the appellant, being engaged in cutting out brickwork, was struck in the same eye by a piece of brick. The result of this accident was that the eye had to be removed. A marked disfigurement has consequently resulted from the mutilation. With regard to his power to do work, it remains as before; but with regard to his power to get work, that appears to have been lost, or at least diminished, and, up to the time of the trial, notwithstanding frequent applications in various quarters, he has been refused employment on account of the disfigurement above referred to.

The case depends upon the construction of certain frequently quoted words in the Workmen's Compensation Act of 1906. The first passage referred to is s. 1, sub-s. 1: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of this Act." It is admitted that the appellant did sustain a personal injury by accident arising out of and in the course of his employment; and, so far as this sub-section is concerned, the language of the Act would seem to cover his case.

It is, however, the words of Sched. I. that have caused difficulty and difference of opinion. The material words of that schedule are as follows: "Schedule I. (1.) The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings," &c. It is said, on the one hand, that incapacity for work has not resulted from the latest injury, because he can do work as well now as before. On the other hand, so far as the practical result to the workman is concerned, this would seem to avail him little, if, by the injury, he has been so disfigured that, while he could do the work if he obtained it, he, nevertheless, cannot get employment, and, so far as compensation to him is concerned, from all practical points of view, he equally suffers by reason of the accident, whether the accident has prevented him from doing work or from getting it. In one view "incapacity for work," which is the language used in clause (b), might not be held to include the case of his being rendered ineligible for employment; whereas many cases occur to the mind, and illustrations have been given in the judgment of Fletcher Moulton L.J., which shew that, as matter of common experience, the capacity for work may remain quite unimpaired, although the eligibility as an employee may be diminished or lost. If a butler is burned by the explosion of a lamp, his appearance may be such, after his recovery, as to prevent him from obtaining a situation as a butler, and he may find himself out of all kinds of employment. In domestic service or in business, particularly shop business, or in cases like those of commercial travellers, the instances might be repeated without limit in which the workman or workwoman would be forced into the ranks of the unemployed by an accident of the kind figured, although in each of these instances, if employers or society would only have disregarded appearances, the workman's real capacity would have been found the same as before.

Admitting the difficulties, I think that not a little help in their solution arises from this consideration, that when compensation for injury is being treated of by the statute, the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to earn a wage which forms the standard upon which the compensation is reckoned. A good illustration is found in par. 3 of the schedule, which says that: " . . . . in the case of

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partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." In the present case, as in those other illustrations to which I have ventured to refer, the workman is neither earning, nor is he able to earn, anything after the accident, and at least he may have to be turned on to a less remunerative position. In the latter case, it is quite clear that the data have been reached under the statute for the estimate of compensation, namely, the difference between his former and his later wage—that difference having been brought about by reason of personal injury by accident arising out of and in the course of his employment. In these circumstances, I incline to the opinion that the true meaning of the statute is that "incapacity for work"—the term employed—does include the case of his eligibility to obtain work being diminished or lost, or, in other words, of his capacity to get work being impaired or destroyed. In the case before us, this arose from the mutilation and disfigurement which he suffered by reason of the accident in September, 1910.

My Lords, it is necessary to keep clearly in view in such cases the distinction between inability to obtain work arising as the result of the injured or disfigured condition of the workman and inability to obtain work arising from the state of the labour market. It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes. The non-employment, as I say, must be connected with the injury which has been received and with the incapacity for work which has been thereby produced. Even treating that incapacity as inclusive of the case of the impossibility or improbability of obtaining work, as well as of doing it, that impossibility or improbability must be traceable to the thing which has differentiated this workman from his other able-bodied comrades, namely, the injury received. If, for instance, one of the probabilities were

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that, at the first appearance of scarcity in the demand for labour, a workman in his injured condition would be the first to suffer, that is simply one of those circumstances with regard to which the county court judge as arbitrator would have to make his best and most judicious estimate. He might, probably he would in the majority of cases, treat such a problematical consideration as entering into his estimate in but a slender degree. But the refinements in these cases have been so frequent that I desire to say once for all that the entire results causally connected with an injury ought to enter into the estimate, but that results attributable to economic causes, such as the state of the labour market, ought to be excluded therefrom.

I am accordingly of opinion that the conclusion reached by the learned Lord Justice Fletcher Moulton is preferable to that reached by the majority of the Court of Appeal, and that this class of case, namely, of persons suffering injuries which result in their unemployment, should not be excluded from the scope of the compensation payable under the Act.

My Lords, I am glad to think that the general conclusions on this subject which I have ventured to state are in accord with the trend of the decided cases in England upon this subject. These cases are already legion. But the question whether compensation is under the statute limited to an award in respect of physical incapacity alone has of necessity, and owing to the circumstances as presented to the Courts, been considered alongside of this other, namely, whether an award once made, say in consequence of the report by a medical referee, can be reviewed by reason of subsequent experiments, and in particular of the experiment which the injured man has himself made of placing his labour on the market, with his experience of finding, or being unable to find, employment.

Upon this latter point the opinion of Lord Collins (then Master of the Rolls) in *Sharman* v. *Holliday & Greenwood, Ld.* (1) has been frequently referred to, and has been followed. There is in the case of *Cardiff Corporation* v. *Hall* (2) what, if I may venture to say so, appears to me a most valuable summary of the English case law upon this subject. These opinions I respectfully adopt. In addition I would venture to quote two

(1) [1904] 1 K. B. 235 at p. 238.

(2) [1911] 1 K. B. 1009, at p. 1015.

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sentences from the late Master of the Rolls in *Clark* v. *Gas Light and Coke Co.* (1) as also expressing my own view on this subject. The learned judge there states the point thus: "The contention was that the only question to be considered was as to the physical condition of the applicant, and that when it was once proved that his physical condition was such as to render him capable of earning the same wages as before, there was an end of the question. It was argued that the question whether his opportunity of finding work from which he might earn the same wages had been narrowed in consequence of the accident ought not to be taken into consideration, the one and only question being as to his physical capacity for work." Upon that subject his view was as follows: "If the applicant was unable in consequence of the accident to command the right of earning wages, who was to suffer, he or his employers? In his opinion, if the applicant, after repeated attempts, could not find an opportunity of putting his diminished powers of working into operation, he was justified in saying that his wage-earning capacity was not the same as before."

In *Radcliffe* v. *Pacific Steam Navigation Co.* (2) the present Master of the Rolls says: "Although I think it is competent to the county court judge to review an award similar to that which was made in June, it is right to add that any such application should be jealously scrutinized, and further, that great care must be taken not to allow the fluctuations of the general labour market to justify a review. But a workman is entitled to say that, although the physical effects of an accident may have disappeared or may be unaltered, yet he, as a damaged man, may be more and more handicapped in the labour market as years pass by. The unwillingness of masters to employ men suffering from any infirmity has been greatly increased by the Workmen's Compensation Act, and this is a circumstance which cannot be disregarded." I refer also in particular, my Lords, to the judgment of Buckley L.J., in which he dwells upon the distinction between inability to obtain employment arising from the injury and such inability arising from general economic conditions. To that distinction I have already alluded.

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(1) 21 Times L. R. 184.

(2) [1910] 1 K. B. 685.

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I regret to observe, my Lords, the marked difference which has arisen on this subject between the English and the Scottish Courts. Upon the general question as to the treatment of the worker under the statute from the point of view of a wage-earner the opinion of Lord M'Laren in *Clelland* v. *Singer Manufacturing Co.* (1) may be referred to. "What," said he, "the arbiter has to consider is not what the man is receiving, whether under the name of wages or charity, from his employer, but what could the man earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident." And later expressions shew in some points a near approximation to the views of the learned judges in England. In *Carlin* v. *Stephen & Sons, Ld.* (2) Lord Salvesen analyses these English cases and says: "In my opinion incapacity for the purposes of the Workmen's Compensation Act is primarily physical incapacity, in which may well be included such personal disfigurement as may lessen the sphere of employment, although the power to work remains as good as before. It does not, in my opinion, include inability to get employment which arises from something not personal to the workman." My Lords, had the state of the Scotch decisions been in accord with these sentences, a difference between them and the English cases would have been far to seek.

In the case, however, of *Boag* v. *Lochwood Collieries, Ld.* (3) the question of what is the meaning of the statutory expression "incapacity for work" was broadly and emphatically decided. The case arose under the Workmen's Compensation Act, 1897, but the language under construction and the point were the same as in the subsequent Act. A workman averred that he was entitled to have a weekly payment reviewed and increased "in respect that his employers were unable to give him suitable light work, and that he was unable to obtain light employment elsewhere." It was held that these grounds were not relevant for inquiry. The Lord Justice-Clerk said: "As I read the Act of Parliament and relative schedule the question to be decided in an application to assess compensation, or under an application for

(1) (1905) 7 F. 975, at p. 983.

(2) 1911 S. C. 901, at p. 907.

(3) 1910 S. C. 51.

Lord Shaw of Dunfermline.

review of weekly payments, is a question of the man's *physical* capacity to work. Now, in this case it had been decided by agreement that the workman was partially capable for work. Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under the statute, I should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of 'capacity to work,' which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the Court whether or not he is able to work." This is a broad affirmance of the proposition that incapacity under the Act must be limited to physical incapacity and to that alone. So stated, I think the proposition—with which I have already dealt at length in the earlier part of my opinion—to be an unsound proposition, and the decision of *Boag* (1) to be erroneous. On June 28, 1911, the First Division pronounced a decision in the same sense in the case of *Macdonald* or *Duris* v. *Wilsons and Clyde Coal Co.* (2) The case, however, following *Boag* (1) as it did, was treated as being governed by that decision. It follows that, in my view, that case has also been erroneously decided.

I humbly think, accordingly, that the decision of the Court below should be reversed, and that the case should be remitted for adjudication by the arbitrator as to the amount of compensation to be awarded to the appellant.

Decision of the Court of Appeal reversed and case remitted to arbitrator.

Lords' Journals, May 13, 1912.

Solicitors for appellant: *Murr, Rusby & Archer, for Sharpe & Darby, West Bromwich.*

Solicitors for respondents: *Helder, Roberts, Walton & Giles, for Tunbridge & Co., Birmingham.*

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(1) 1910 S. C. 51, at p. 52.

(2) p. 513, post.

[HOUSE OF LORDS.]

MACDONALD OR DURIS . . . . APPELLANT;

AND

WILSONS AND CLYDE COAL COMPANY . RESPONDENTS.

H. L. (Sc.)*
1912
May 13.

Employer and Workman—Compensation—Review—Incapacity for Work—Inability to get Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-s.* 1; *Sched. I., pars.* 1 (*b*), 3.

A coal miner, who had sustained an injury by accident, was paid compensation by his employers under a registered agreement on the footing of partial incapacity and was also provided with light work at the picking tables, but he was ultimately dismissed. While so employed, he was certified by a medical referee to be fit for light work such as that on which he was engaged, and there had not since been any change in his physical condition. After his dismissal the miner applied for a review and increase of compensation upon the averment that owing to his condition he was unable to obtain suitable work and that his former employers were unwilling or unable to supply him with the same:—

Held, that the averment disclosed a relevant ground for reviewing the compensation.

Decision of the First Division of the Court of Session reversed.

Boag v. *Lochwood Collieries, Ld.*, 1910 S. C. 51, overruled.

APPEAL from an interlocutor of the First Division of the Court of Session upon a case stated by the sheriff-substitute for Lanarkshire sitting as arbitrator under the Workmen's Compensation Act.

On February 16, 1909, the appellant sustained injury by accident arising out of and in the course of his employment. He at first received compensation from his employers, the respondents, under an agreement recorded on May 27, 1909, at the rate of 20*s.* per week on the footing of total incapacity.

From May, 1909, to December, 1910, he was provided with light work at the picking tables by the respondents, and during this period the compensation which he had previously been receiving was reduced by agreement between him and his employers and thereafter continued to be paid at the rate of 16*s.* 11*d.* per week. While at said light work, in September, 1910, the parties remitted the question of the appellant's fitness for work to a medical referee, who reported that the appellant was fit for light work such as he was at that date engaged in. On December 6, 1910, the appellant was dismissed from his employment with the respondents. The appellant's physical condition had not changed in any way since the date of the medical referee's report. A memorandum of the agreement to accept 16*s.* 11*d.* per week having been recorded on January 11, 1911, the appellant presented an application for review, claiming an increase of the weekly payments to the full sum of 20*s.* per week. The appellant averred as the ground of his application that "owing to his condition he is unable to obtain work in the district and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with the same." The relevancy of this averment was disputed before the arbitrator when the facts above stated were agreed on between the parties. In these circumstances the arbitrator, founding on the case of *Boag* v. *Lochwood Collieries, Ld.* (1), held that the appellant's averments disclosed no relevant grounds for review of his compensation.

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

The question of law for the opinion of the Court was whether the arbitrator was right in so holding.

The First Division of the Court of Session, on the authority of *Boag* v. *Lochwood Collieries, Ld.* (1), affirmed the determination of the arbitrator.

1912. March 12. *Ure, K.C.* (*Lord Advocate*), and *Alexander Moncrieff* (of the Scottish Bar), for the appellant. The averment is relevant. The appellant's physical condition renders his work unsaleable. The medical certificate shews that the man is fit for light work, but he cannot get it. With reference to the words "in the district," the term "suitable employment" in paragraph 3 of the First Schedule to the Workmen's Compensation Act implies that the work must be somewhere in the neighbourhood. The appellant has made efforts to get employment, but has been refused employment owing to his injured condition. The First Division of the Court of Session considered themselves bound by *Boag* v. *Lochwood Collieries, Ld.* (1) In that case there was no averment that the inability to get work

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(1) 1910 S. C. 51.

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was due to incapacity, but the Court did not proceed on that ground, and the appellant admits that there is no distinction between the two cases. That decision is wrong and ought to be overruled, as it is in conflict with the views expressed in other cases by the First Division of the Court of Session in Scotland and by the Court of Appeal in England. The respondents' case is that the medical report is conclusive against the appellant, but that view is not in accordance with the authorities. A man is unable to earn if he is physically in such a condition that he cannot get work. In *Rosie* v. *Mackay* (1) the Lord President said that the report of the medical referee was not conclusive as to the man's wage-earning capacity, and in his judgment it would have been competent for the workman in that case to shew that the wage-earning capacity of a ruptured man was less than the capacity he had before the accident, and in *Clelland* v. *Singer Manufacturing Co.* (2) Lord M'Laren took the same view and considered the material question to be whether the capacity of the workman—i.e., his capacity to earn wages in the open market—was diminished by the accident. Coming now to the English cases, *Sharman* v. *Holliday & Greenwood, Ld.* (3) is directly in point. There the county court judge had reduced the compensation to a nominal amount upon the balance of the medical evidence, and, although no change supervened in the physical condition of the workman, yet it was held upon an application by him to increase the weekly payment that the repeated refusal of employment by reason of his physical condition was admissible as evidence of incapacity notwithstanding the medical testimony. The same principle was followed in *Clark* v. *Gas Light and Coke Co.* (4), *Radcliffe* v. *Pacific Steam Navigation Co.* (5), and *Proctor & Sons* v. *Robinson.* (6) In *Cardiff Corporation* v. *Hall* (7) it was assumed that evidence of this nature was admissible, but there was a difference of opinion whether there was evidence to support the finding of the county court judge. [They also referred to *Carlin* v. *Stephen & Sons, Ld.* (8)]

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(1) 1910 S. C. 714, at p. 720.
(2) (1905) 7 F. 975, at p. 983.
(3) [1904] 1 K. B. 35.
(4) (1905) 21 Times L. R. 184.
(5) [1910] 1 K. B. 685.
(6) [1911] 1 K. B. 1004.
(7) [1911] 1 K. B. 1009.
(8) 1911 S. C. 901.

Scott Dickson K.C. (*Dean of Faculty*), and *H. W. Beveridge,* for the respondents. The appellant's averment is not sufficiently specific. "Owing to his condition" should be "owing to his condition as the result of the accident" and "in the district" cannot be read as qualifying the character of the work. But apart from these objections, the question is whether the workman is in fact physically incapable. So far as physical incapacity is concerned, the appellant is able to do the work, but he cannot get it. That is not the kind of injury for which compensation is given by the Act. *Boag's Case* (1) accurately states the question from the respondents' point of view. *Rosie* v. *Mackay* (2) is not inconsistent with the view that it is purely physical incapacity which has to be considered, and that also is the view of the Lord President in *Clelland* v. *Singer Manufacturing Co.* (3) The point there was that the employers were paying the man wages to avoid giving compensation. That, of course, is not conclusive of the question of his capacity. Even the English decisions do not go so far as the appellant contends. In *Cardiff Corporation* v. *Hall* (4) Fletcher Moulton L.J. says that there can be no general principle that in the case of partial incapacity the employer is bound to shew not only what work the workman can do, but also that he can get such work, though he recognizes that that burden may be cast upon the employer in exceptional cases, and he instances the case of an accident leaving the man's labour in the position of an "odd lot" in the labour market. Here the appellant is found suitable for picking coal. That is a well-known line of work, and, where the workman is fit for any well-known line of work, it is not relevant to prove that he has tried to get work and failed. *Boag's Case* (1) is sound law and shews that the inquiry must not extend to matters which have nothing to do with the man's incapacity for work and that the fact that employers do not like a damaged man is not relevant.

Ure, K.C. (*Lord Advocate*), replied.

The House took time for consideration.

(1) 1910 S. C. 51.
(2) 1910 S. C. 714.
(3) 7 F. 975.
(4) [1911] 1 K. B. 1009, at p. 1020.

H. L. (Sc.)
1912
MACDONALD OR DURIS v. WILSONS AND CLYDE COAL COMPANY.

May 13. EARL LOREBURN L.C. My Lords, in this case the appellant asked for a review of a certain agreed weekly payment of 16*s.* 11*d.* under the Workmen's Compensation Act upon the ground that "owing to his condition he is unable to obtain work in the district and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with the same." In fact it was agreed that he was fit for light work such as is done at the picking tables, and was so employed by the respondents for some eighteen months after the accident, and still is so fit, but was dismissed by the respondents in December, 1910, and thereupon applied for a review under Sched. I., paragraph 16. The learned sheriff ruled that the appellant's averments disclosed no relevant grounds for review of his compensation, and in this view the First Division upheld him.

I am not able to arrive at the same conclusion, and I think the English cases cited to us proceed upon the sound view. The purpose of the Act as declared in the first section is to compensate for injuries. The measure of the compensation is given in the First Schedule, paragraphs 1 to 3 inclusive. Ought we to say that if a man, though physically fit for some work, is prevented by the consequence of the injury from obtaining it,—in other words is disabled from earning wages,—that nevertheless he is "able to earn" wages and is not under any incapacity for work? He is under an incapacity if his condition makes his labour unsaleable or saleable only at a less wage.

In regard to the averment that he is "unable to obtain work in the district," I think it must be understood in the sense that he cannot get work suitable for his condition in any place within reasonable access. The arbitrator must say what a man can fairly be asked to do in order to obtain employment and so maintain himself wholly or in part in order not to be a burden upon others. This is only one of the numberless difficulties in applying this Act, but it is a difficulty of fact, not of law.

LORD MACNAGHTEN. My Lords, I entirely agree.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, in this case the appellant sustained an injury by accident arising out of and in the course of his employment. He became totally incapacitated and received compensation of 20*s.* per week, and a memorandum of agreement was recorded on May 27, 1909. The respondents provided him with light work at the picking tables till December, 1910, and during that period his compensation was reduced by agreement, and thereafter continued to be paid at the rate of 16*s.* 11*d.* per week. In September, 1910, a report was obtained from a medical referee to the effect that the appellant was fit for the light work such as he was then engaged in, namely, at the picking tables. On December 6, 1910, the respondents, who were reducing the number of their workmen, dismissed him. The appellant maintains that the circumstances are now different from those which existed when he agreed to accept 16*s.* 11*d.* per week, because he has entered the open labour market, and, notwithstanding all his efforts, he is unable, on account of his injuries, to obtain any employment. He asks an opportunity of proving that his applications have been unsuccessful and that his want of success "has not been due to the state of the labour market, but to his incapacity, and also to the very limited type of work which is now within his powers."

I am of opinion that this is a relevant claim for inquiry. The question of law put for the opinion of the First Division by the learned sheriff-substitute was, "Was I right in holding that the appellant's averments disclosed no relevant grounds for review of his compensation?" The First Division, following *Boag* v. *Lochwood Collieries, Ld.* (1), answered the question in the affirmative. I am of opinion that it should have been answered in the negative, that the case of *Boag* (1) was wrongly decided, and that the case put forward by the workman was one suitable for investigation. It should be explained that the appellant's averment as the ground of his application for review that "owing to his condition he is unable to obtain work in the district" was, by a very proper agreement between the parties, who desired to have the more general question decided, held equivalent to an averment not confined to the particular district or small locality

(1) 1910 S. C. 51.

in which he had been working, but was held equivalent to a proposition that he was unable to obtain suitable work.

My Lords, in the case of *Ball* v. *William Hunt & Sons, Ld.* (1) I have to-day had occasion to deal with the law of England and Scotland upon this subject, and with the difference which has arisen between the two; and I referred to the present case as following that of *Boag* (2), decided by the Second Division of the Court of Session. I need not accordingly recapitulate my views. For the reasons there stated by me, I am of opinion that this appeal should be sustained.

Interlocutor of the First Division of the Court of Session in Scotland reversed and case remitted to the sheriff-substitute to adjudicate accordingly.

Lords' Journals, May 13, 1912.

Agents for appellant: *Deacon & Co., London, for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Beveridge, Greig & Co., for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

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(1) Ante, p. 496.

(2) 1910 S. C. 51

[HOUSE OF LORDS.]

H. L. (Sc.)*
1912
Feb. 27.

GLASGOW AND SOUTH WESTERN RAILWAY COMPANY . . . . APPELLANTS;

AND

THE PROVOST, &c., OF THE BURGH OF AYR . . . . RESPONDENTS.

Local Government—Street—Private Street—" Obstruction"—Road belonging to Railway Company subject to Public Right—" Road forming part of any railway"—Burgh Police (Scotland) Act, 1892 (55 *&* 56 *Vict. c.* 55), *s.* 4, *sub-s.* 31 —*Burgh Police (Scotland) Act,* 1903 (3 *Edw.* 7, *c.* 33), *s.* 104, *sub-s.* 2 (*d*).

By the Burgh Police (Scotland) Act, 1892, s. 4, sub-s. 31, " 'Street' shall include any road, highway, ... thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station . . . ." By the Burgh Police (Scotland) Act, 1903, which refers to the Burgh Police Act of 1892 as the "principal Act," s. 103, sub-s. 6, " 'Private street' shall, in the principal Act and in this Act, mean any street other than a public street." By s. 104, sub-s. 2 (*d*), " . . . . Where any private street or part of such street has not . . . . been sufficiently levelled, paved . . . . and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof . . . . to be freed from obstructions and to be properly levelled, paved . . . ."

In an action by the appellants, a railway company, against the respondents for a declaration that a strip of ground acquired by the company was not subject to any of the provisions of the Burgh Police (Scotland) Acts, 1892 to 1903, it appeared that the ground formed half of a road or street and had been purchased in 1889 by the company for "extraordinary purposes" under s. 38 of the Railways Clauses Consolidation (Scotland) Act, 1845. The company made no use of the ground until 1908, and it was never metalled or made up as a road, but it was admitted that it had been used by the public as a right of way for all purposes since the year 1841. In 1908 the company laid down a double line of rails on the ground which were an obstruction to the public right of way:—

Held, affirming the decision of the First Division of the Court of Session (1911 S. C. 298), that in the circumstances the road could not be taken to be "part of a railway" within the meaning of s. 4 of the Act of 1892, but must be regarded as a "private street," and the rails were liable to be removed as "obstructions" within the meaning of s. 104 of the Act of 1903.

APPEAL from an interlocutor of the First Division of the Court of Session, Scotland (1) (Lord President Dunedin and

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* *Present:* EARL LOREBURN L.C., LORD ATKINSON, LORD GORELL, and LORD SHAW OF DUNFERMLINE.

(1) 1911 S. C. 298.

H. L. (Sc.)
1912

GLASGOW AND SOUTH WESTERN RAILWAY v. PROVOST OF AYR.

Lord Kinnear, Lord Johnston, and Lord Mackenzie), affirming an interlocutor of the Lord Ordinary (Lord Salvesen).

The facts and extracts from the statutes bearing on the point are given in the opinions of the Law Lords, but the following short summary of them may be useful. The respondents, the provost and magistrates of the burgh of Ayr, on March 14, 1908, passed a resolution to cause a certain defined portion of a road called Oswald Road within the burgh to be freed from obstructions and to be properly levelled and otherwise made good in terms of the Burgh Police Acts, 1892 to 1903. The resolution proceeded on the narrative that Oswald Road was within the meaning of these Acts a "private street" which had not been sufficiently paved, causewayed, &c., to the satisfaction of the respondents. The appellants, the Glasgow and South Western Railway Company, on the other hand, gave evidence to shew that Oswald Road was forty feet wide and that they were proprietors of the solum to the extent of thirty feet on the west side. They maintained that this thirty feet strip formed part of the site of a waggon road leading to the harbour of Ayr, which was acquired by the appellants in 1889 for the purposes of their railway, and accordingly they contended that the strip of road in question was a part of their property and not a "private street." The respondents alleged that the legal status of the strip of Oswald Road had been the subject of litigation to which the appellants had been a party, namely, in the case of *Glasgow and South Western Ry. Co.* v. *Hutchison* (February 19, 1908). (1) In that case the First Division expressed an opinion adverse to the appellants' argument that the strip in question was a "part of a railway," holding that Oswald Road was a "private street." Four days later, on Sunday, February 23, 1908, the appellants proceeded to lay down a double line of railway on a considerable portion of Oswald Road. On March 14 the respondents passed a resolution under s. 104, sub-s. 2 (*d*), of the Burgh Police (Scotland) Act, 1903, to have Oswald Road freed from obstructions. The appellants applied to the Court of Session to have the resolution quashed, but the Extra Division of the Court refused to quash the resolution and dismissed the appellants' appeal (November 3, 1908) (1) on the ground that the mere laying of the rails could not affect the legal position of the street as declared by the First Division. No appeal was taken against that judgment. Thereafter, on December 7, 1908, the appellants raised the present action of declarator and interdict to prevent the respondents from proceeding with or putting into force the resolution of March 14, 1908. The Lord Ordinary (January 13, 1910) held that Oswald Road was a "private street" and that the appellants were not entitled to lay rails on it. The First Division (December 8, 1910) unanimously adhered to the Lord Ordinary's judgment (2), Lord President Dunedin stating that he was still of opinion that Oswald Road was a "private street" and not "part of a railway"; that Oswald Road had been a "private street" at least since the passing of the Burgh Police (Scotland) Act, 1892; and that the appellants could not at their own hand take it out of the category of "private street" by putting down rails on it. Further his Lordship referred to the case of *Stewart* v. *Greenock Harbour Trustees.* (3)

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(1) 1908 S. C. 587.

1911. Nov. 13, 14. *Sir Alfred Cripps, K.C.*, and *H. P. Macmillan* (the latter of the Scottish Bar), for the appellants. The act of the company in laying down the rails in 1908 was a lawful exercise of their statutory powers. The resolution of the council and the finding that this road is a "private street" are an illegal interference with the property of the company.

Charles D. Murray, K.C., and *Hon. William Watson* (with them *Munro, K.C.*) (all of the Scottish Bar), for the respondents. The question whether this strip of ground is part of the railway is a question of fact which has been decided in the respondents' favour. The strip of ground has been used by the public for carts and horses ever since 1892 and is not a part of the railway. The company cannot strengthen their position by placing rails on the ground. The public acquired their rights before there was any road and before the purchase by the railway company. [They referred to *Kinning Park Police Commissioners* v.

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(1) 1909 S. C. 41.

(2) 1911 S. C. 298.

(3) (1864) 2 M. 1155.

Thomson & Co. (1) and *Magistrates of Edinburgh* v. *North British Ry. Co.* (2)]

Sir Alfred Cripps, K.C., replied.

The House took time for consideration.

1912. Feb. 27. LORD ATKINSON. My Lords, this is an appeal from interlocutors pronounced by the Lord Ordinary, who tried the case, and the First Division of the Court of Session affirming the former.

The controversy between the appellants and respondents out of which the appeal arises relates to a strip of ground thirty feet in width, situated formerly within the burgh of Newton-upon-Ayr, now within the extended boundaries of the burgh of Ayr, and forming part of what has come to be known as Oswald Road. One Mr. Oswald of Auchencruive was in 1837, when the appellants obtained their first Act authorizing the construction of their railway, owner of this land. How he got it, or to what purpose he intended to devote it, is, in my view, irrelevant. He was admittedly seised and possessed of the full proprietary right in it.

In the year 1889 the appellants purchased this strip of land from Oswald for the sum of 3500*l.* They acquired it under the powers conferred upon them by the Railways Clauses Consolidation (Scotland) Act, 1845, for extraordinary purposes, which purposes are, by s. 38 of that statute, defined to be "making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods, ..." and "For the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway." Whether, as between the company and the vendor, the strip of land was subject to any right in him over it is irrelevant. The proprietors of the land abutting on the eastern side of this strip, that is the side furthest away from the appellants' railway, at some remote time added a strip of about ten feet wide for the greater part of the length of the strip so purchased, and this enlarged strip, forty feet in breadth, is now called Oswald Road. On February 23, 1908, the railway company laid down a double line of rails on this ground. Up to that date they had never used it for any purpose. It was never bottomed, or metalled, or made up as a road. In some places it was grass grown, but the railway company admit that there is and long has been a public right of way over it for the passage of horses, carts, and of persons on foot. And further, it has been found on the facts at the trial of the case that the rails so laid down were an obstruction to the right of the public thus to use it.

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(1) (1877) 4 R. 528, 530.

(2) (1904) 6 F. 620, 639.

The earlier litigation it is unnecessary to deal with, but the town council of Ayr on March 14, 1908, acting under the provisions of the 133rd section of the Burgh Police (Scotland) Act, 1892, as amended by the 104th section of the Burgh Police (Scotland) Act, 1903, passed a resolution to have the road put in order and freed from obstruction. This resolution, it is admitted, could only be legally passed by the town council on the assumption that the road in question had, at the date of the resolution, become and was a private street. The railway company accordingly instituted this action seeking to have it declared that the strip of ground was not, at the date of the resolution, a private street, and that this being so the respondents had no right to interfere with the pursuers. A proof having been taken, the case, after much litigation, came on for hearing, with the result that the Lord Ordinary pronounced the interlocutor of January 13, 1910, by which the respondents, the magistrates, were assoilzied; and this interlocutor was by the interlocutor of the First Division dated December 8, 1910, adhered to.

The question upon which the case turns is this: Had this place become a "private street" within the meaning of the 25 & 26 Vict. c. 101 (repealed by the Burgh Police (Scotland) Act, 1892) or within the meaning of the latter statute? The definitions of a street and a private street are in the two statutes identical.

Private street in each means a street maintained, or liable to be maintained, by persons other than the commissioners. This place, Oswald Road, was certainly not maintained by the commission. So far as it was maintained at all, it was maintained by some persons other than the commission. Then was it a street when these rails were laid down upon it? "Street" is thus defined in the Burgh Police (Scotland) Act, 1892: Sect. 4 (31.).—"'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing path or bank."

It is not denied that this road was used by horses in carts and foot passengers long before the year 1862, when the 25 & 26 Vict. c. 101 was passed. Up to 1889, the date of the purchase by the railway company, it would appear to me that this statute operated upon the state of things existing for twenty-seven years. There could be no question of any part of the street being a railway during that period, but even if this were not so, I think it is not enough that the soil merely should, after it has become subject to a public right of way, be acquired by a railway company for extraordinary purposes, if it never has in fact been used for any of those purposes. The mere acquisition of the land for extraordinary purposes, coupled with an intention ultimately to use it for some of them, cannot by itself convert land allowed to lie waste into a railway within the meaning of this definition. In my view, therefore, this Oswald Road had become a private street, if not long before 1889 certainly before February, 1908, when the rails were laid down upon it. There is no doubt that a public right of way may, under the 46th section of the Railways Clauses (Consolidation) Act of 1845, in the absence of any provision in the special Act prohibiting it, be exercised over the permanent way of a railway. *Dartford Rural District Council* v. *Bexley Heath Railway* (1) established this. But here the fact has been found against the appellants that the rails as laid are an obstruction to the public right of way. It is not necessary to decide at present whether if this place, Oswald Road, had become a private street, as I think it clearly has, the company could not ever lay down rails upon it, but certainly they cannot do so in such a way as to cause an obstruction such as it is found they have created. The decisions appealed from are, therefore,

(1) [1898] A. C. 210.

in my opinion, right, and should be affirmed, and this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I do not entertain any doubt that the Scotch Courts have come to a correct conclusion in this case. It is only because on both sides of the Bar it was represented that the question at issue between, so to speak, railways on the one hand and municipal authorities on the other was of great importance in Scotland, that I venture again briefly to resume the facts. It does not appear to me to be necessary, however, in doing so, to go into the history of the strip of ground afterwards known as Oswald Road, Ayr, or to recount its various transmissions since 1765 up to the date when it was acquired by the railway company from Mr. Oswald in 1889.

In 1885 this road or piece of ground originally a part of the burgh of Newton-upon-Ayr was wholly incorporated in the extended burgh of Ayr. My Lords, what was then the situation of that piece of ground? That is cleared up by the admission of parties to this effect, that it "has been used by the public as a right of way for all purposes at least since the year 1841," this admission being made, of course, by the pursuers without prejudice to their pleas as to the effect of their acquisition of the solum in 1889 in virtue of their conveyance, and the Railway Acts. It may be useful as a test to look at the state of matters in and after this year 1885. The municipal boundaries of Ayr in that year included this ground. It is admitted that it has been used by the public as a right of way for all purposes at least since 1841. The Burgh Police Act of 1892 had no doubt not then been passed, but its predecessor, the Police and Improvement Act of 1862, a statute which was not referred to in the discussion, was in full operation. By the definition of that Act it does not appear to me to be doubtful that the ground was a "private street." By s. 3, "the expression 'private street' shall mean any road, street, or place within the burgh, (not being or forming part of any harbour, railway or canal station, depot, wharf, towing path, or bank) used by carts, and either accessible to the public from a public street or forming a common access to lands and premises separately occupied, and which has not been before the adoption of this Act, well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." As I say, it does not appear to be open to doubt, accordingly, that Oswald Road in and after 1885 was a private street.

In 1889, acting under the provisions of s. 38 of the Railways Clauses Consolidation (Scotland) Act, the appellant company, by voluntary agreement, acquired that ground. I shall refer later to what I consider to be the effect of that statute, but I may remark that from the date of that acquisition in 1889 until February, 1908, the ground does not appear to have been in fact used or appropriated as any part of a railway. No rails were laid down upon it, no exclusive possession was taken of it, but, on the contrary, it stands admitted that the public rights and thoroughfare existed as before. The town council of Ayr exercised their ordinary jurisdiction with regard to private streets over it; and in 1896, without objection by the appellants, a public sewer was laid in Oswald Road, and we were informed that the gas mains were also, under public authority, there laid.

Meantime, in 1892, the Burgh Police (Scotland) Act had passed, and the statutory definitions therein are as follows: "'Private street' shall mean any street maintained, or liable to be maintained, by persons other than the commissioners," and it is further provided that "'Street' shall include any road, highway . . . . thoroughfare and public passage, or other place within the burgh, used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing path, or bank." For the purposes of this case there is no material distinction between this and the language of the Act of 1862, and there can be no reasonable argument against the proposition that both de facto and de jure in February, 1908, the road in question was, and had for many years been, a private street within the jurisdiction of the municipal authorities of Ayr.

My Lords, there are various conclusions of the summons in this case, but it was candidly admitted by Sir Alfred Cripps that he desired a judgment which would for practical purposes combine the third and fourth conclusions in this way—"that the said strip of ground is not subject to any of the provisions of the Burgh Police (Scotland) Acts . . . . because the said strip of ground forms part of the railway of the pursuers within the meaning of the said Burgh Police (Scotland) Acts . . . . and is not a private street . . . . and is in no way subject to any of the provisions of the said Acts relating to streets." There follows, my Lords, the fifth conclusion, which appears to me to be a serious but quite logical consequence of the third and fourth conclusions which I have cited, and to constitute what, in my opinion, is a most audacious demand. It is to the effect that the appellants are entitled to maintain and use for the purpose of their undertaking the said strip of ground and the lines of rails already laid down thereon, and to lay down, maintain, and use for said purposes such further lines of rails thereon as they may deem expedient.

It appears that on March 14, 1908, the town council of Ayr had passed, under their statutory powers, a resolution requiring that this portion of Oswald Road should be freed from obstructions and properly levelled, bottomed, &c., and it is, of course maintained that this resolution was invalid if the other conclusions of the summons are affirmed. In a word, the object of this suit is this: that it was within the power of the railway company in February, 1908, by laying rails on this private street, to destroy its character as such, and to cut it out of the jurisdiction of the Ayr municipal authorities, and of all the provisions of the Burgh Police Act. The appellants, it is maintained, had the power to do this, because by laying the rails they made the ground part of the railway, and so brought it within the exception to private streets. It follows accordingly that the surface of the ground can, according to the argument, be used without let or hindrance by locomotives, trucks, and carriages, and that the rails can be laid, as in point of fact they are, over the drainage system underneath. I mention these things to shew the state of confusion and danger, both above and below ground, which might result from a decree in the terms of the conclusions of this summons, and from an affirmance of the construction of the Acts of Parliament for which the appellants contend.

My Lords, the argument hinges upon the proposition that the strip of ground is part of a railway and within the exception to private streets in the Burgh Police Acts. I desire to state broadly, in the first place, that I think "part of a railway" is, and was meant to be, part of a railway in fact, and not merely ground, buildings, or the like, which happen to be the property of the railway. It is easy to figure, my Lords, the acquisition of property, say, for suites of offices or other convenient accommodation, possibly in parts of burghs which are not even adjoining the actual railway as it is generally understood. Such property may be acquired under the 38th section of the Railways Clauses Consolidation Act, and I should hold it to be quite unsound to suggest that the fact of such purchase operated to cut out such ground, buildings, &c., from the municipal jurisdiction of the burgh. But if the ground, buildings, &c., are merely the property of the railway, and do not, in the language of the Act, form part of any harbour, railway, or canal station, &c., then it does not appear to me that the exception which is founded upon has any application.

I now turn to s. 38 of the Railways Clauses Act, which permits the company, in addition to their powers of compulsory taking, privately to purchase a certain limited amount of land "adjoining or near to the railway, or to any other railway communicating therewith, and on which the traffic thereon may pass, and in any town or city adjoining to or near such railways" . , . . "for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway." My Lords, speaking for myself, I do not entertain any doubt that, instead of the land, which is dealt with in s. 38, being treated as land which forms part of the railway, it is, on the contrary, treated as land which is different from the railway, in fact, but is "adjoining or near to the railway" or convenient for the "formation or use of the railway." The railway, in short, is one thing, even as used in that statute, and the land which is the subject of s. 38 is another thing, and the Act nowhere provides that the mere acquisition of property by the company shall thereby operate its conversion into part of the railway.

This, my Lords, might be sufficient to dispose of this case, but I desire to give my adhesion to the view which is set forth in the opinion of the learned Lord President. I do not agree with what was maintained to have been his view, that the Act of 1892 must speak from its date, and that accordingly everything must stand fixed at that period. I do not think that the latter of these propositions is implied in what the learned Lord President said, but I understand his meaning to be, and, if so, I entirely concur in it, that when the Act of Parliament passed it became operative when and as the circumstances arose within the area of the burghal jurisdiction to which its provisions could apply. Land might be laid out subsequent to 1892, and rights of access might be granted, or facts as to public thoroughfares emerge, and, as these things occurred, the provisions of the Act of 1892 could be called into operation. I need not go through the many sections of the statute which shew that the Act was meant to have its adaptations to emerging circumstances as I have mentioned; but I find nowhere in the Act any countenance to the suggestion that, apart from the express authority of Parliament, the statutory municipal jurisdiction, once set up, could be thereafter cut down or cut into by the acts of inhabitants or corporations within the burgh. This, however, is precisely what, according to the argument of the appellants, has occurred. Against the will of the respondents the railway company have placed down these rails, and they propose to treat and use the road as non-burghal, and to bring about the exclusion of the municipal jurisdiction, together with the confusions and dangers to which I have alluded.

My Lords, I do not think that there is any sanction for these proceedings on account of the fact that the land has been acquired under s. 38 of the Railways Clauses Act, nor do I think the effect of the railway company's action is to set up the exception to, and exclusion from, the Burgh Police Acts, as contended for.

My Lords, in view of this opinion, it is unnecessary for me to refer to the subsidiary parts of the case. I think, for instance, that the *Greenock Case* (1), in which it was held that the working of locomotive traffic on rails through a public street was so plainly an obstruction to traffic as not to require any evidence to be led upon the subject, was rightly decided. Nor is it needful to make any pronouncement upon the question of whether finality attaches to the action of the town council in forbidding obstructions, that action having been already ratified in foro contentioso. My humble opinion being that the foundation of the appellants' case is unsound, it follows that they had not power, apart from statute, to cut down the burghal jurisdiction, and that they are not entitled to decline to give effect to the town council's resolution for the proper levelling, macadamizing, freeing from obstructions, &c., of this road.

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(1) 2 M. 1155.

I agree in the course proposed, and think that the appeal should be dismissed.

EARL LOREBURN L.C. My Lords, I agree and have nothing to add.

I desire to say that my noble and learned friend Lord Gorell agrees.

Appeal dismissed with costs.

Lords' Journals, February 27, 1912.

Agents for appellants: *Sherwood & Co., for John C. Brodie & Sons, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for P. A. Thomson, Town Clerk, Ayr, and James Ayton, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)* ALEXANDER STEPHEN & SONS, LIMITED APPELLANTS;

1912

AND

March 11. ALLAN LINE STEAMSHIP COMPANY, LIMITED . . . . RESPONDENTS.

Ship—Collision—Moving and Stationary Vessels—Compulsory Pilot—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.

Interlocutor of the First Division of the Court of Session, 1911 S. C. 836, affirmed on the facts.

THIS appeal arose out of a collision which took place in the river Clyde between the steamship *Bruxellesville*, belonging to the appellants, and the steamship *Buenos Ayrean*, belonging to the respondents. The appeal was brought from an interlocutor of the First Division of the Court of Session (the Lord President (Lord Dunedin), Lord Kinnear, Lord Johnston, and Lord Mackenzie) affirming an interlocutor of the Lord Ordinary (Lord Dewar) whereby it was found that the respondents were not liable for the collision. (1) No question of law was raised by the appeal.

Laing, K.C., and *R. S. Horne, K.C.* (of the Scottish Bar), for the appellants.

Butler Aspinall, K.C., *Robertson Dunlop*, and *A. H. Ball*, for the respondents, were not called upon.

The House affirmed the interlocutors appealed from.

Appeal dismissed with costs.

Lords' Journals, March 11, 1912.

Agents for appellants: *Thomas Cooper & Co., for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *Pritchard & Sons, for Wilson, Caldwell & Tait, Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

(1) 1911 S. C. 836.

[HOUSE OF LORDS.]

THOMPSON . . . . APPELLANT; H. L. (E.)*

AND 1912

DIBDIN AND OTHERS . . . . RESPONDENTS. *June* 20.

Ecclesiastical Law—Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver—Marriage with Deceased Wife's Sister—Criminal Suit—Monition—Prohibition—1 *Edw.* 6, *c.* 1, *s.* 8—*Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, *c.* 47), *s.* 1.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, validates a marriage between a man and his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, and whether before or after the date of the passing of the Act.

The immunity granted by the first proviso to the section to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to the subject-matter of the enacting clause and relates to matters connected with the solemnization of the marriage.

Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within s. 8 of 1 Edw. 6, c. 1, for repelling the parties to the marriage from Holy Communion.

Where, therefore, the Arches Court of Canterbury admonished a clergyman, who, since the passing of the Act, had repelled the parties to such a marriage from Holy Communion by reason of their marriage and cohabitation, to refrain from so repelling them in future:—

Held, that a writ of prohibition ought not to be granted to restrain the Arches Court from proceeding further in the matter of the monition.

Decision of the Court of Appeal [1910] P. 57, affirmed.

APPEAL from an order of the Court of Appeal affirming an order of the King's Bench Division. (1)

The appellant, the Reverend Henry Thompson, was a clerk in Holy Orders of the Church of England and was the vicar of the parish church of Eaton in the diocese of Norwich and an honorary canon of Norwich Cathedral.

The respondent Alan Neville Banister was a baptized and confirmed member of the Church of England and was a parishioner of the parish of Eaton. He was a regular attendant at divine service at the parish church and a frequent communicant.

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* *Present:* EARL LOREBURN, EARL OF HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

(1) [1910] P. 57.

In July, 1907, Mr. Banister, having been then for some time a widower, was desirous of marrying his present wife, the respondent Emily Blanche Banister, who was the sister of his deceased wife, and was also a baptized and confirmed member of the Church of England, and, being under the impression that the marriage, if solemnized in Canada, would be valid in England under the provisions of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, he was minded to go to Canada with his intended wife and have the marriage ceremony performed there. He informed the appellant of his intention, and the appellant replied that under the law of the Church he (the appellant) would in such case not be permitted to receive Mr. Banister to Holy Communion. Notwithstanding this, Mr. Banister proceeded to Canada and on August 12, 1907, was married to his present wife at the church of St. Giles, Montreal. This marriage, though valid by the law of Canada, was invalid by the law of England until August 28, 1907, when the Deceased Wife's Sister's Marriage Act, 1907, came into force and by its retrospective operation validated the marriage as a civil contract. In September, 1907, Mr. and Mrs. Banister returned from Canada and took up their residence at Eaton. A correspondence then ensued between Mr. Banister and the appellant with reference to the admission of Mr. and Mrs. Banister to Communion at their parish church (1), with the result that by a letter dated October 24, 1907, addressed to Mr. Banister, the appellant, acting under the direction of the bishop, finally refused to admit Mr. Banister and his wife to partake of the Holy Communion in the parish church. Thereupon Mr. and Mrs. Banister promoted a criminal suit against the appellant under the Church Discipline Act, 1840, charging him with an offence against ecclesiastical law in refusing the sacrament to the promoters without lawful cause and asking that he should be canonically punished and condemned in the costs of the suit.

This suit was sent to be heard and determined by the Arches

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(1) This correspondence is fully set out in the report of *Banister* v. *Thompson* [1908] P. 362, at pp. 365, 366.

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Court of Canterbury by letters of request signed by the Bishop of Norwich under s. 13 of the Church Discipline Act, 1840.

The appellant by his responsive plea alleged that he had lawful cause for refusing to administer the Holy Communion to the promoters in their parish church, and that such cause was that by reason of their affinity, such affinity being notorious, and of their open and notorious cohabitation as husband and wife, the promoters were open and notorious evil livers, so that the congregation were thereby offended within the meaning of the rubric prefixed to the Order of Administration of the Lord's Supper or Holy Communion in the Book of Common Prayer, and he also relied upon the first proviso to s. 1 of the Deceased Wife's Sister's Marriage Act, 1907, as exempting him from liability to any ecclesiastical suit.

The suit was heard by the respondent Sir Lewis Dibdin as Official Principal of the Arches Court, and in the result Sir Lewis Dibdin by his judgment held that the appellant was liable to be admonished for having repelled the promoters from Holy Communion and admonished to refrain from similar acts in the future (1), and a monition was duly issued against him. The appellant then obtained a rule nisi calling upon the respondents to shew cause why a writ of prohibition should not be awarded to prohibit them from further proceeding in the matter of the monition, but this rule was discharged by the Divisional Court (Darling and A. T. Lawrence JJ., Bray J. dissenting), and the decision of the Divisional Court was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton and Farwell L.JJ.).

1912. May 6. *Sir R. Finlay, K.C.*, and *P. V. Smith* (*Hansell* with them), for the appellant. The appellant comes within the first proviso to s. 1 of the Deceased Wife's Sister's Marriage Act, 1907. (2) That proviso was inserted for the protection of

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(1) [1908] P. 362.

(2) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 1: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity:

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clergymen of the Church of England in the performance of the duties of their office; it is not limited to duties incidental to the celebration of the marriage. It is a proviso upon an enactment defining the extent to which a marriage between a man and his deceased wife's sister shall be valid and it embraces all matters relating to such a marriage. The position of the appellant has been misunderstood. No right is claimed on the part of any clergyman of the Church of England to pronounce any informal excommunication against the parties to such a marriage by permanently repelling them from Communion. The clergyman has a right to repel them provisionally, but then the matter goes to the bishop, and thenceforward the clergyman must act according to the directions of the bishop, who may either take proceedings or not as he thinks fit. [They referred to the Canons of 1603, Canons 26, 27, 99, and the rubric prefixed to the Communion Service in the Book of Common Prayer.] The proviso preserves all the rights which a clergyman had previously to the passing of the Act having regard to ecclesiastical law. Two questions are raised by this appeal, first as to the correct construction of the statute, and secondly

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Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed.

"Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in holy orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

"Provided also that in case, before the passing of this Act, any such marriage shall have been annulled, or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid."

Sect. 4: "Nothing in this Act shall relieve a clergyman in holy orders of the Church of England from any ecclesiastical censure, to which he would have been liable if this Act had not been passed, by reason of his having contracted or hereafter contracting a marriage with his deceased wife's sister."

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whether this is a proper case for prohibition; but the first is the substantial point, because if this is a case in which the statute has been misconstrued it is clearly a case for prohibition. At the time of the passing of the Act of 1907 the marriage of a man with his deceased wife's sister was void under Lord Lyndhurst's Act (5 & 6 Will. 4, c. 54). Prior to that Act such a marriage was not ipso facto void, but proceedings could be taken in the Ecclesiastical Court in the lifetime of the parties for the annulment of the marriage and also for the exaction of penalties in respect of the ecclesiastical offence. These marriages were also unlawful by the ancient canon law and they were declared contrary to the law of God by the statutes of Henry VIII. (28 Hen. 8, c. 7, and 28 Hen. 8, c. 16), which are still in force. See note to *Sherwood* v. *Ray* (1), adopted by Lord Wensleydale in *Brook* v. *Brook*. (2) The Act of 1907 does not purport to repeal either the statutes of Henry VIII. or the Act of 1835 or the Canons of 1603 or the ecclesiastical law, but s. 1 enacts that such a marriage shall be valid "as a civil contract." In other words it validates the marriage for all civil purposes, but it goes no further. The section deals with marriage in its civil aspect only, not in its ecclesiastical aspect; on the contrary it carefully abstains from trenching on anything which does not relate to its civil aspect. The dual aspect of marriage is recognized by Lord Stowell in *Dalrymple* v. *Dalrymple*. (3) The Court of Appeal in construing the section as meaning that the marriage shall be good for all purposes have misapprehended the intention of the Legislature. Contrast the language of this section with the language of s. 1 of the Colonial Marriages (Deceased Wife's Sister) Act, 1906, which deals with the same subject-matter. By the latter section the marriage is declared "legal for all purposes." If that had been the intention of the Legislature in the Act of 1907 why did it avoid using the same form of words? Again, the Matrimonial Causes Act, 1857, by s. 57, empowers the respective parties to a divorce suit after a decree for dissolution to marry again "as if the prior marriage had been dissolved by death," and it contains a proviso that no clergyman of the Church of England "shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person." Why was not the same form of words used in the first proviso to s. 1 of the Act of 1907, if the intention was the same? That the Legislature in framing the Act of 1907 had the Matrimonial Causes Act, 1857, in its mind is shewn by the fact that the second proviso to the first section of the later Act is taken bodily from s. 58 of the earlier Act except that the word "may" is substituted for the word "shall." The fair inference is that the difference in the language in the Act of 1907 was intentional in each case and that the Legislature wilfully abstained from dealing with the ecclesiastical aspect of marriage and intended the first proviso to have the general effect which its language imports, namely, to afford a clergyman the same protection in his obedience to ecclesiastical law as if the Act had not been passed. This contention is supported by s. 4 of the Act, which proceeds on the view that contracting such a marriage might be an offence under ecclesiastical law.

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(1) (1837) 1 Moo. P. C. 353, at pp. 355—359.

(2) (1861) 9 H. L. C. 193, at p. 244.

(3) (1811) 2 Hagg. Cons. 54, at pp. 62—64.

[Lord Atkinson. Suppose a man succeeded in getting a clergyman to celebrate the marriage, do you say that he could still be repelled from Communion as a notorious evil liver?]

To the extent to which before the Act such a person could be repelled he can still be repelled.

[Lord Atkinson. How can you say that the ecclesiastical law is the same as before, seeing that before the Act there could have been no religious ceremony for such marriages?]

The question turns upon the construction of the first proviso.

To treat this proviso as confined to the celebration of the marriage and matters ancillary to such celebration is to restrict the immunity in such a way as to render it practically useless.

Sir J. Simon, S.-G. (*Sir Rufus Isaacs, A.-G.*, and *Rowlatt* with him), for the respondent Sir Lewis Dibdin.

[Earl Loreburn L.C. Will you please state the heads of your argument?]

1. So far as the question raised by this appeal turns upon the construction of the rubric the proper remedy is not prohibition, but an appeal to the Privy Council. If on the other hand

the Ecclesiastical Court wrongly construes the statute, then no doubt the proper remedy is prohibition. This respondent has decided that a notorious evil liver means a person who offends against the generally accepted morality of Christendom. That can only be reviewed by the Privy Council.

2. In regard to marriage the law of the Church follows the law of the land, and those persons are married who are married by the law of the land. Marriage is not a sacrament in the sense that Communion is. It has never been part of the law ecclesiastical that persons who are married by the law of the land are notorious evil livers.

3. The proviso includes immunity from ecclesiastical and civil censure, and "civil" in this connection means civil and criminal. That proviso must be limited in some way, and it is rightly limited in the manner proposed by the Courts below.

Danckwerts, K.C., *Errington*, and *Franey*, for the respondents Mr. and Mrs. Banister, were not called upon.

Sir R. Finlay, K.C., replied.

The House took time for consideration.

June 20. EARL LOREBURN. My Lords, the facts on which this case arises are very short and beyond dispute. The respondent Mr. Banister married his deceased wife's sister in Canada, though not there domiciled, and on his return with his wife to England the vicar of their parish, the Reverend Mr. Thompson, refused to admit Mr. and Mrs. Banister to the Holy Communion upon the ground that they were so married, and were living together as husband and wife. I need not refer to the proceedings before Sir Lewis Dibdin further than to say that he made a decree and monition requiring the clergyman to abstain, in the future, from denying the Holy Communion to either of these spouses. Was he wrong in law?

The rights of parishioners in this matter depend primarily upon statute 1 Edw. 6, c. 1, under which the incumbent of a parish may not, without lawful cause, deny the Holy Communion to any parishioner who would devoutly and humbly desire it.

The first question is whether the appellant has assigned a lawful cause. The lawful cause alleged in this clergyman's responsive pleas is that Mr. and Mrs. Banister, by reason of their affinity, such affinity being notorious, and of their open and notorious cohabitation as husband and wife, were and are open and notorious evil livers, so that the congregation were and are thereby offended within the meaning of the rubric prefixed to the Order of Administration of the Lord's Supper or Holy Communion in the Book of Common Prayer.

I regret that this plea was placed upon the record. In his correspondence, and also by his counsel in argument, Mr. Thompson refrained from actually making this charge, but it stands upon his pleading. It is inconceivable that any Court of law should allow as a lawful cause the cohabitation of two persons whose union is directly sanctioned by Act of Parliament and is as valid as any other marriage within the realm.

The second material contention on behalf of the clergyman rests upon the first proviso to the first section of the Deceased Wife's Sister's Marriage Act, 1907. The proviso is as follows: "Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed."

It is said that if this Act, which validated such marriages as a civil contract, had not been passed no clergyman could have been admonished for refusing to admit these spouses to the Communion Table, and that accordingly Mr. Thompson cannot be admonished now.

Now the language of the proviso will admit of this construction if taken literally, but it can only be so if it means that a clergyman is absolved for anything of whatever kind that he may do or omit in the performance of the duties of his office which he could have done or omitted before the Act was passed. It is impossible so to construe this language. Before the Act was passed he might have celebrated a marriage between two persons, one of whom had already married his deceased wife's sister. If he can do so now he may with impunity countenance

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and further bigamy. No one can or does maintain that such latitude is given by the proviso, and yet the contention of the clergyman cannot prevail upon any narrower construction.

I agree with the Master of the Rolls that the proviso must be limited to the subject-matter of the enacting clause. Looking to that, and to the second proviso which follows in the same section, it seems to me that the first proviso certainly relieves the clergyman from the duty of celebrating such a marriage as this in fact is. It is, therefore, not a meaningless protection. There is something to satisfy the language. It may be that he is protected in other respects, but I prefer not to speculate upon cases which may hereafter arise.

I respect the conscientious motives which, I do not doubt, actuated Mr. Thompson, but he was not in law entitled to act as he did.

I desire to say no more than is necessary for the decision of this appeal, knowing that upon such subjects as have been discussed here and in the Courts below it is easy to give needless offence to deep and sincere convictions upon matters which affect private conscience.

In my opinion this appeal must be dismissed with costs.

EARL OF HALSBURY. My Lords, I have myself written a judgment on the subject; I entirely concur with the judgment of the late Lord Chancellor, and I do not think it necessary to proceed further with the matter. I will only say this: In the first place, with reference to the obligation on the clergyman himself to repel from Holy Communion open and notorious evil livers, it appears to me that the language of the rubric prefixed to the Communion Service is inappropriate to the present case, and it is to be observed it is the language of that which is not indeed strictly one of those things which are called by reason of their ancient usage "the rubric," but is part of the enacting part of the Act of Edward VI. which establishes the Prayer Book. If any one will look at it he will see that the original, which I have examined for the purpose, has a column (in which directions are given sometimes with and sometimes without authority, I believe) for what has been called the "rubric by reason of it being in red letters; but this particular enactment is one which is in substance what we should call the Act,—the Act establishing the first Prayer Book of Edward VI. The importance of that is that it is obligatory upon the clergyman to do that which this particular part of the Act prescribes; and I have no doubt the clergyman in this case thought that it was his duty to act as he did, only I think he has misconstrued the direction. I think he has misconstrued it, because, to my mind, the language is absolutely inappropriate. Considering the difference there used to be between those marriages which were absolutely void and those marriages which were voidable, it is impossible to suppose that such language as that could be applicable to what was, until set aside by ecclesiastical authority, a valid marriage. It appears to me the language is wholly and utterly inappropriate to the circumstances of the present case. Everybody would have understood, and I think everybody now would understand, what was the meaning of "persons of notorious evil life"; and to say that that language is appropriate to these persons, who are legally married and whose marriage is absolutely established by Act of Parliament, would, as it seems to me, if it were not so serious a matter, be ludicrous.

Under those circumstances, my Lords, I entirely concur with the judgment of the late Lord Chancellor. I think that this appeal must be dismissed with costs.

LORD ASHBOURNE. My Lords, I am unable to see any room for serious doubt in this case, although I am sure that the appellant is solely animated by conscientious considerations.

Under the statute of 1 Edw. 6, c. 1, s. 8, a clergyman is bound not, "without a lawful cause," to deny Communion. The rubric in the Communion Service, which has statutable sanction, provides that, if any one who intends to be a partaker of the Holy Communion "be an open and notorious evil liver, or have done any wrong to his neighbour by word or deed, so that the congregation be thereby offended," the clergyman may repel him. Under the statutes of Henry VIII. marriage with a deceased wife's sister was declared to be prohibited by God's law, and to be illegal and void. Lord Lyndhurst's Act declared that all future marriages of that class should be "absolutely null and void," so that no room for doubt was left on the subject. But a serious change was effected in 1906 by the Colonial Marriages (Deceased Wife's Sister) Act, which enacted that marriages of this kind between persons domiciled in a colony where such marriages were legal should be legal for all purposes within the United Kingdom.

In 1907, after many years' discussion and controversy, the Act now in question was passed. It is impossible to conceive language more clear and unambiguous than is found in the first section: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity." The effect of this was to make such a marriage lawful for all purposes, entitled to be recognized as such within the realm or without, and that without stint or qualification. I am unable to see any room for doubt that the direct effect of s. 1 was to remove such marriages from the class of marriages prohibited by the statutes of Henry VIII., and to make the description of "open and notorious evil livers" entirely inappropriate to those who came within its provisions. Such a marriage of unimpeachable legality could not be "a lawful cause" under the statute of Edward VI.

The words "as a civil contract" do not really help the appellant. They cannot diminish or lessen the status or the rights of those who come within its terms. They are lawful spouses, whether married in church or registrar's office, and must in law be so regarded. The words may have been inserted to relieve the clergy from the obligation of performing or aiding the marriage, but they cannot make duality in marriage. I think that the difficulty of the clergyman would be overwhelming who sought openly in church to repel, against their respectful protest, from the Holy Table such spouses as "open and notorious evil livers" on the sole ground that they were living together as man and wife in accordance with the law of the land—it may be after being married in church by another clergyman—and although the congregation, so far from being offended, held them in respect and esteem. It might be that they had been married in the very church and had subsequently on previous occasions without question partaken of the Holy Communion.

Much, if not the main, reliance has been placed by the appellant's counsel on the first proviso to s. 1. I do not think that the argument founded on it is well founded. It is opposed to the settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso—that is, the marriage contract. It is not a separate or independent enactment. The words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context.

The section must be read as a whole as the first section of "An Act to amend the Law relating to Marriage with a Deceased Wife's Sister." I have read the clear enactment with which it commences, saying that such marriages should no longer be void or voidable. Then follows the first proviso for the relief of a clergyman who might omit to do, or do, anything in respect of which he would not be liable if the Act had not been passed. It does not add "and as if no such marriage had taken place." That marriage must remain as a vital and enduring fact when amendment would be impossible and unlawful, as the spouses are by law bound to live together. In my opinion that section gives relief, and is intended to give relief, in respect of such marriages and their performance, to individual clergymen, whose conscientious objections it was deemed right to safeguard. The second proviso strongly confirms this view: "Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in holy orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel." In my opinion this second proviso powerfully supports the view that the first proviso cannot be read as an independent enactment, and must be read in connection with what precedes and what follows it, as dealing with the objection of the clergyman to take any part in or ancillary to the marriage service.

All other clergymen are left free, and the objecting clergyman is expressly told that he may permit any other clergyman, who was duly qualified, to celebrate such a marriage in his church.

In my opinion the appeal should be dismissed.

LORD MACNAGHTEN. My Lords, I entirely agree with the judgments which have been delivered and the motion proposed.

LORD ATKINSON. My Lords, I agree and have nothing to add to the judgments which have been delivered.

Appeal dismissed.

Lords' Journals, June 20, 1912.

Solicitors for appellant: *Brooks, Jenkins & Co.*

Solicitor for respondent Sir Lewis Dibdin: *The Treasury Solicitor.*

Solicitors for respondents Mr. and Mrs. Banister: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Mills & Reeve, Norwich.*

[PRIVY COUNCIL.]

J. C.* 1911 Dec. 5, 6, 7. 1912 May 17.

DOMINION COTTON MILLS COMPANY, LIMITED, AND OTHERS . . . . DEFENDANTS;

AND

GEORGE E. AMYOT AND OTHERS . . . . . . PLAINTIFFS.

ALFRED BRUNET . . . . INTERVENANT.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC IN REVIEW.

Dominion Statute 63 *&* 64 *Vict. c.* 98, *s.* 1 (*a*)—*Construction—Lease by Company of all its Property intra vires—Power of Majority of Shareholders to approve Lease—Minority bound in the Absence of Fraud.*

In an action by two shareholders in a cotton company to set aside a lease of the company's mills and also a resolution of the company in general meeting approving of the same:—

Held, that it was incumbent upon the plaintiffs to shew that the majority of the shareholders either acted ultra vires or so abused their powers as to deprive the minority of their rights.

Burland v. *Earle* [1902] A. C. 83, followed.

Held, also, that (1.) the lease was within the letter of Dominion statute 63 & 64 Vict. c. 98, s. 1 (*a*), which expressly authorized the cotton company to dispose of its mills; (2.) the evidence shewed that the terms of the lease were fair in fact and in intention to the shareholders.

APPEAL from a judgment of the Superior Court in review (June 30, 1910) affirming a judgment of Demers J. (February 17, 1909).

The respondent plaintiffs, shareholders in the Dominion Cotton Mills Company, sued under the circumstances stated in the judgment of their Lordships to set aside a lease dated November 10, 1905, whereby the said Cotton Company demised to its co-defendants the Dominion Textile Company certain cotton mills and other properties for a term of twenty-one years, being all the mills and properties then in the possession of the Cotton Company; and also a resolution of the same date passed by a majority of the

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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shareholders approving that lease, the Textile Company itself controlling the majority of the shares.

The questions raised by the pleadings and on the appeal were (1.) whether the lease was ultra vires and void; (2.) whether it was also void because at its date the Textile Company held the majority of the shares in the Cotton Company and because, as alleged by the respondents, the terms of the lease were unfair, amounting to a fraud on the shareholders of the Cotton Company.

Demers J. set aside both lease and resolution. He found that the lease was at an undervalue and only explicable on the ground that the Textile Company had the control of the majority of the stock of the Cotton Company. He held that he was entitled to look at all the circumstances before and after the lease to enable him to decide whether there had been a fraudulent intent. In the result he came to the conclusion that the lease was approved without necessity, not in the interest of the Cotton Company, but in the private interest of the controlling shareholders, i.e., the Textile Company, upon terms ruinous to the other shareholders, in pursuance of a fixed design on the part of the Textile Company to get possession of the business and property of the Cotton Company.

The Court of review affirmed this decision. Charbonneau J. dissented and held that the lease was neither ultra vires nor inequitable as things appeared at the time that it was granted.

The case was twice argued before their Lordships. The first argument was heard in July, 1911. (1)

Sir R. Finlay, K.C., *Geoffrion, K.C.*, and *Geoffrey Lawrence*, for the appellants, contended that the Cotton Company had authority by its special Act (63 & 64 Vict. c. 98, s. 1 (*a*)) to dispose of its property by the lease in question, which authority extended to the whole of its property and was not limited to a part: see *Wilson* v. *Miers* (2) and *Featherstonhaugh* v. *Lee Moor Porcelain Clay Co.* (3) The evidence shewed the existence of circumstances of such stress that a continuance of the ordinary course of business pursued by the Cotton Company would have resulted in insolvency, and the lease was justified in that it enabled the business of the company to be carried on by lessees, the company receiving a fair rent, which was more than the average annual profits made by the Cotton Company during the preceding eleven years. But its financial condition, the condition of trade, and the competition between the various cotton companies existing at the date of the lease rendered amalgamation a necessity, and the arrangements made were a fair and equitable solution of the difficulties of the situation. The lease was sanctioned by a majority of the shareholders. The evidence failed to shew that they had perpetrated any fraud on the minority. It rather established that the interests of the company were in good faith and effectively considered in the transactions in question.

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(1) Present: Lord Macnaghten, Lord Shaw of Dunfermline, Lord De Villiers, and Lord Robson.

(2) (1861) 10 C. B. (N.S.) 348.

(3) (1865) L. R. 1 Eq. 318.

Rowlatt, for the respondents, contended that the evidence supported the findings of the Courts below. It shewed that the lease was at an undervalue, and that its object and effect were to give the controlling shareholders a greater share in the profits of the Cotton Company's business than the dissentient minority. The whole series of transactions which ended in the approval by resolution of the lease resulted from a conspiracy by the directors of the Cotton Company to take advantage of the shareholders. They were acting in the interests of the Textile Company and in their own private interests in breach of their duty to their shareholders. There was not a full or sufficient disclosure of all the circumstances, and it resulted that the resolution approving the lease was passed by the votes of the Textile Company fraudulently for the purpose and with the result of sacrificing the interests of the Cotton Company to those of the Textile Company. The plaintiffs, therefore, were entitled to have it set aside as unauthorized and unfair to them. He referred to R. S. C., 1906, c. 79, art. 123, and to *Burland* v. *Earle*. (1)

James Samuel Green, for the intervenant, contended to the same effect.

At the close of the argument the Lord Chancellor said that their Lordships would report to His Majesty that the appeal should be allowed.

(1) [1902] A. C. 83.

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The reasons for the report were subsequently delivered by

LORD MACNAGHTEN. At the conclusion of the argument in this case it was intimated that their Lordships would humbly advise His Majesty that the appeal should be allowed and the action dismissed with costs both here and below to be paid by the respondents, and that the intervenant should bear his own costs. An order to that effect has been made, and it only remains for their Lordships to state briefly their reasons for the advice so tendered to His Majesty.

The action was brought by two shareholders in the Dominion Cotton Mills Company, Limited, hereinafter called the Cotton Company, in their individual capacity against the Cotton Company and the Dominion Textile Company, Limited, hereinafter called the Textile Company, seeking to set aside a lease of the Cotton Company's mills, dated November 10, 1905, which was granted by the Cotton Company to the Textile Company for the period of twenty-one years from April 1, 1905, as well as a resolution passed by the Cotton Company in general meeting approving of that lease.

No further or other relief was sought by the plaintiffs.

The trial judge in the Superior Court gave judgment for the plaintiffs and set aside both the resolution and the lease with costs against both companies.

In the Superior Court in review the judgment of the trial judge was affirmed by a majority of two judges to one, Charbonneau J. dissenting.

The grounds on which the plaintiffs claimed relief were (1.) that the lease was ultra vires the Cotton Company, and (2.) that the transaction was of a fraudulent character and amounted to a confiscation of the interests of the plaintiffs and other dissentient shareholders.

The Cotton Company was incorporated by letters patent in the year 1890, with the object of carrying on the business of cotton manufacturers. In 1900 the letters patent were superseded by the Dominion statute 63 & 64 Vict. c. 98, which empowered the Cotton Company " to construct, acquire, operate, and dispose of cotton and woollen manufactories of every description."

Although the Cotton Company paid dividends in the earlier part of its existence, at first at the rate of 8 per cent. and afterwards at the rate of 6 per cent., the management seems to have been unsound from the beginning. No reserve fund was formed. No provision was made for renewals. In 1899 on the appointment of a new manager a sum of about $2,000,000 was spent or misspent on machinery. The expenditure was made without the consent or knowledge of the Bank of Montreal, who were the largest creditors of the Cotton Company. Then application was made to the bank to provide for this expenditure. The manager of the bank was much dissatisfied, and it was a question with the bank whether they would find the money or make the Cotton Company liquidate their bills. Ultimately the bank consented to make the required advance on the company agreeing to issue bonds to the amount of $2,000,000. The bonds were underwritten by the directors and the principal creditors of the company, the Bank of Montreal underwriting for $500,000 and the president of the Cotton Company and his friends for a still larger amount. It was found impossible to dispose of these bonds on the market either in Canada or England. The evidence is that "nobody would take them." So the bank consented to carry them for a time. The directors had previously endeavoured to raise money by the issue of preference shares, but they got no support from the general public and very little help from shareholders. Towards the end of 1901 payment of dividends was discontinued. The shares of the company fell to 26 cents. The position of affairs was serious. The prospect of dividends was, as the manager of the Bank of Montreal says, "very remote." To add to the gravity of the situation ruinous competition was going on in the cotton business. The principal competitors of the Cotton Company were the Merchants Cotton Company, the Montmorency Cotton Mills Company, and the Colonial Bleaching and Printing Company. The Cotton Companies, as Mr. Forget, the late president of the Cotton Company, says, "were fighting each other for all they were worth."

In this state of things on December 29, 1904, the Royal Trust Company, on behalf of a syndicate formed for the purpose of acquiring capital stock and a controlling influence in the Cotton Company and its three principal competitors, sent a circular to the shareholders in the Cotton Company offering to purchase shares in that company at 50 per cent. of their par value, payable half in 6 per cent. bonds and half in 7 per cent. preference stock of a new company then in course of formation, and afterwards incorporated by letters patent as the Dominion Textile Company. The offer was accompanied by a letter signed by the directors of the Cotton Company stating that they had considered the offer in all its bearings and had come to the conclusion that it was a reasonable proposal backed by responsible parties and that they considered its acceptance in the best interests of their shareholders, and adding that they had as individual shareholders accepted the offer and recommended all their shareholders to do the same.

The holders of 24,467 shares in the Cotton Company out of 30,336 shares then outstanding accepted the offer of the Royal Trust Company and transferred their shares accordingly. Those shares were afterwards vested in the Textile Company. The Textile Company also acquired a preponderating influence in the three other companies and thus became in a position to manage the businesses of the four companies as one concern. At first it was arranged that the Textile Company should sell the goods produced in the mills of the Cotton Company at a commission which is shewn by evidence to have been a fair and reasonable commission. Afterwards, as a simpler and more convenient mode of conducting the combined business, it was arranged that the Textile Company should take a lease of the Cotton Company's mills, and so the lease of November 10, 1905, was executed. It is in respect of this lease that the plaintiffs sue for relief in this action, and the relief as already stated is confined to a claim to have the lease declared null and void. It is difficult to see what legitimate advantage the plaintiffs could hope to obtain from the only relief they claimed. The lease if not ultra vires, even though annulled by the Court, was capable of being ratified by the majority, who were of course interested in supporting it.

The principles applicable to cases where a dissentient minority of shareholders in a company seek redress against the action of the majority of their associates are well settled. Indeed they were not contested at the Bar. In order to succeed it is incumbent

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on the minority either to shew that the action of the majority is ultra vires or to prove that the majority have abused their powers and are depriving the minority of their rights. It would be pedantry to go through the line of decisions by which those principles have been established. But there is a passage in a recent judgment of this Board in the case of *Burland* v. *Earle* (1), which has the high authority of Lord Davey, so apposite to the circumstances of the present case, that it may be useful to cite it at length.

"It is," say their Lordships, "an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their power, and, in fact, has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company the action should be prima facie brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (2) and *Mozley* v. *Alston* (3), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property,

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(1) [1902] A. C. 83.
(2) (1843) 2 Hare, 461.
(3) (1847) 1 Ph. 790.

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or advantages which belong to the company or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works.* (1) It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall* v. *Gardiner.* (2)

"There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote. This is shewn by the case before this Board of the *North-West Transportation Co., Ld.* v. *Beatty.* (3) In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

The first question, therefore, is: Was the lease of November 10, 1905, ultra vires? On that point there is really no room for doubt or argument. The Dominion statute of 1900 in express terms authorizes the Cotton Company to dispose of its mills, and the lease which is impeached by the plaintiffs is a disposition within the letter of the statute.

The next question is: Have the majority abused their powers and deprived the minority of their rights? In their statement of claim the plaintiffs alleged that the lease was the result or outcome of a conspiracy on the part of the syndicate which began by coercing or deluding shareholders in the Cotton Company into parting with their shares at an undervalue. And the learned counsel, with the view, it was said, of throwing light on the transaction impeached by the plaintiffs, dwelt at considerable length on the circular of the Royal Trust Company, the recommendation of the directors of the Cotton Company, and the short space of time which the shareholders had to make up their minds whether they would or would not sell their shares at the price offered. But the sale of the company's shares to the Textile Company is not the gist of this action. No complaint apparently, has ever been made by any one of the selling shareholders on the score of undervalue or on any other ground. And the majority of the directors not being members of the syndicate after investigation and consideration accepted the offer of the Royal Trust Company without acquiring or seeking to acquire any interest in the syndicate. No doubt the syndicate hoped and expected to make a good thing out of the venture, and of course they offered the lowest price which in their opinion would tempt a majority of the shareholders to part with their shares. On the other hand it must be borne in mind that unless the venture were successful the security for the price offered would be of comparatively little value.

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(1) (1874) L. R. 9 Ch. 350.
(2) (1875) 1 Ch. D. 13, at p. 25.
(3) (1887) 12 App. Cas. 589.

The plaintiffs have gone into a great deal of evidence for the purpose of shewing that there was a suspicion of some unfair dealing somewhere, and that the lease was granted at an undervalue. In their Lordships' opinion they have not succeeded in proving anything of the kind. The bulk of their evidence consists of a collection of directors' reports in past years in which the shareholders were presented with statements that would not bear close examination, and with a view of the position of the company that was over-sanguine if not extravagant. Nor have the plaintiffs, in their Lordships' opinion, succeeded in shewing any oppressive conduct or any want of good faith on the part of the directors of the Textile Company, or the directors of the Cotton Company nominated by the Textile Company, or any individual connected with the management of either of those companies. Oddly enough, in the statement of claim, one of the grievances of the plaintiffs is that they were not given an opportunity of taking part in the scheme which they denounce as a fraudulent conspiracy. The evidence seems to shew that the valuation which the directors of the Cotton Company placed on the assets of that company at the time when the syndicate made their offer was a fair and liberal valuation, that the Cotton Company was then going from bad to worse, that there was no reasonable prospect of any revival of prosperity, and, what is still more important, that the terms of the lease were intended to be fair and are fair.

In their Lordships' opinion the case of the plaintiffs failed on both grounds and they had no hesitation in advising His Majesty that the action should be dismissed.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents and intervenant : *Blake & Redden.*

[PRIVY COUNCIL.]

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1912
Jan. 25, 26 ;
April 23.

REID-NEWFOUNDLAND COMPANY . . . DEFENDANTS;

AND

ANGLO-AMERICAN TELEGRAPH COMPANY, LIMITED . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Construction of Contract—Restricted Use by Defendants of Plaintiffs' Special Wire over their Railway—Defendants Trustees of Profits from unauthorized User of Special Wire—Account—Limitation—Newfoundland Trustee Act, 1898.

The appellants were in possession of their railway under a lease which was subject to a subsisting contract with the respondents under which they were entitled to use a special wire erected and maintained by the respondents in and about their railway as defined in the contract, but were bound "not to pass or transmit any commercial messages over the said special wire except for the benefit and account of" the respondents. They nevertheless used it for all the purposes of their business, including certain new and extended lines of railway and their shipping business, and other commercial undertakings :—

Held, that in regard to the unauthorized user of the special wire the appellants were accountable as trustees for the profits so made to the respondents, and that having regard to the Newfoundland Trustee Act, 1898, their plea of limitation must be overruled.

Burdick v. *Garrick* (1870) L. R. 5 Ch. 233, approved.

APPEAL from a judgment of the Supreme Court of Newfoundland (February 1, 1911).

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* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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1912

Reid-Newfoundland Company v. Anglo-American Telegraph Company, Limited.

On July 3, 1907, the Supreme Court ordered an account before the registrar against the appellants in respect of messages passed or transmitted over a special wire erected by the respondents, but which were not authorized by the contract subsisting between them dated August 11, 1888, which is set out in their Lordships' judgment. This order was affirmed by the Judicial Committee: see [1910] A. C. 560.

During the progress of the reference before the registrar the appellants took the objection that they were not liable to account in respect of the period from April 1, 1898, the date from which the appellants had possession of the wire, to November 2, 1899, on the ground that items before the latter date accrued more than six years before action and were barred by the Statute of Limitations. Subsequently they filed the following plea:—"As to so much of the plaintiffs' claim as accrued before the 2nd day of November, 1899, the same is barred by the Statute of Limitations (21 Jac. 1, c. 16, and local statutes)." The respondents replied that this was no defence, the action being taken on a specialty contract.

The Supreme Court held by a majority that the claim of the respondents was based on the specialty contract of August 11, 1888, and on that ground overruled the plea of limitation.

Danckwerts, K.C., and *R. E. Moore*, for the appellants, contended that so much of the respondents' claim as arose prior to November 2, 1899, was barred by the Statutes of Limitation, which were 21 Jac. 1, c. 16, s. 3; 3 & 4 Will. 4, c. 42, s. 3; and local statutes, being Newfoundland Cons. St., 1892, c. 85, ss. 1 and 12; the Trustee Act, 1888, s. 8; the Trustee Act, 1893, which repeals the whole of the former Act except ss. 1 and 8; the Trustee Act, 1894, s. 29; and the Trustee Act, 1898, s. 29, sub-s. 1, and s. 55. The contract of August 11, 1888, did not result in this being an "action on a specialty" within the meaning of the Limitation Act. The claim did not arise out of any privity between parties to that contract, or any contract by the appellants, but out of an obligation to observe a covenant in that contract of which they had notice and of which equity would enforce the observance. Reference was made to *Hovenden* v. *Lord Annesley* (1); *Smith* v.

(1) (1806) 2 Sch. & Lef. 629.

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Clay, cited in a note to *Deloraine* v. *Browne* (1); *Tobacco Pipe Makers' Co.* v. *Loder* (2); *Knox* v. *Gye* (3); *Conolly* v. *Gorman.* (4)

Sir R. Finlay, K.C., and *Rowlatt*, for the respondents, contended that the contract of August 11, 1888, was a specialty contract and that the appellants' obligation to account thereunder was the same as that of the Newfoundland Railway Company, by whom the same was extended under seal. The appellants having taken the railway and the lease thereof with notice of the contract were placed in the same position in equity as if they had been parties to it. The messages of which an account was directed were under the circumstances transmitted for the benefit and account of the respondents. The appellants were under a fiduciary obligation to account in respect of the same, and the Limitation Acts did not apply in the absence of an express provision. The Trustee Act, 1898 (Newfoundland), in the case of trustees in the position of these appellants withholds the protection afforded by limitation.

Danckwerts, K.C., in reply.

The judgment of their Lordships was delivered by

1912
April 23.

LORD ROBSON. This appeal is from a judgment of the Supreme Court of Newfoundland in an action brought on November 2, 1905, by the Anglo-American Telegraph Company against the Reid-Newfoundland Company, wherein the defendants pleaded the Statutes of Limitations (21 Jac. 1, c. 16, and local statutes) as to so much of the plaintiffs' claim as accrued prior to November 2, 1899. The plaintiffs had replied that the plea disclosed no defence because the action was taken on a specialty contract under which the period of limitation was twenty years. The issue thus raised was heard on February 1, 1911, before the Full Court, which decided, by a majority of two out of three judges (Emerson J. dissenting), that the plaintiffs' replication was good.

The respondents are a telegraph and cable company which, at the times material to the case, possessed certain privileges in relation to the construction and working of telegraph lines under

(1) (1792) 3 Bro. C. C. 633.
(2) (1851) 20 L. J. (Q.B.) 414.
(3) (1872) L. R. 5 H. L. 656.
(4) [1898] I. L. R. 1 Ch. 20, 36.

the Newfoundland statute 17 Vict. c. 2. The appellants are the lessees of the Newfoundland railways which they operate and manage by virtue of statutory powers.

By an agreement under seal made on August 11, 1888, between the Newfoundland Railway Company (the former owners of a portion of the appellants' railway system) of the first part, F. H. Evans, the receiver and manager of the said Newfoundland Railway Company, of the second part, and the respondents of the third part, it was agreed, among other things, that the respondents should erect and maintain along the lands forming the roadways of the southern division of the railway company's railway between St. John's and Harbour Grace, and between Harbour Grace and Carbonear, a "special wire" for the railway company, their successors and assigns, for use in and about the operation of the said railway as therein defined, and the Newfoundland Railway Company agreed "not to pass or transmit any commercial messages over the said special wire, except for the benefit and account of the telegraph company."

The Newfoundland Railway Company made default in completing the construction of the line, and on July 13, 1897, that company and its receiver and manager sold and conveyed the railway to the Newfoundland Government, and the conveyance was expressed to be "subject to the subsisting contract with the Anglo-American Telegraph Company as regards the telegraph line along the said railway."

The Government then undertook the completion of the railway, as before defined, and further proceeded greatly to extend it to other parts of the island.

On March 3, 1898, a contract was made between one R. G. Reid and the Government, which was afterwards duly confirmed by statute, whereby the Government agreed to lease to the said Reid all the railways of the Colony for a term of fifty years from April 1, 1898, and in the year 1901 a further Act was passed by the Colonial Legislature for the purpose of incorporating the appellant company and transferring to it all the rights and liabilities of Mr. Reid under the contract of March 3, 1898.

Since April 1, 1898, R. G. Reid and the appellants have used

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the "special wire" in and about the operation of railways other than the railway between St. John's and Harbour Grace, and between Harbour Grace and Carbonear. In fact, they have used it for all the purposes of their business, including the new or extended lines of railway and their shipping business, and other commercial undertakings.

The respondents accordingly brought this action against the appellants for (1.) an account of all telegraphic messages sent by R. G. Reid and the appellant company over the special wire since April 1, 1898, other than messages connected with the operation of the railway as defined by the contract of August 11, 1888, (2.) payment of the amount found to be due, and (3.) damages. The Supreme Court gave judgment for the telegraph company on the general question of liability, and their judgment was affirmed by this Board, but the question as to what, if any, period of limitation applied to the plaintiffs' claims was, by arrangement between the parties themselves, left over for subsequent argument, and now comes up for final determination.

The Supreme Court have held, by a majority, that as the agreement of August 11, 1888, was under seal the appellants were liable as on a specialty. In their Lordships' opinion it is not necessary to determine this question on which the learned judges disagreed. The claim of the respondents rests on surer ground. The appellants took over the railway together with the "special wire" comprised in the agreement of August 11, 1888, with notice of the limitations and conditions attached to the user of that wire. It seems to their Lordships that when and as often as the appellants used the special wire for the transmission of unprivileged messages an obligation in the nature of a trust arose on their part, and it became their duty to keep an account of the profits accruing from such use of the wire, and to set those profits aside as moneys belonging to the respondents. To such a duty, so created, the Statute of Limitations can have no application unless by express statutory provision. The appellants are accountable as trustees, and, in giving to trustees the protection of the Limitation Acts, the Trustee Act, 1898 (Newfoundland) (61 Vict. c. 38), to which reference was made in the course of the argument, withholds

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such protection from a trustee when the proceedings are taken to recover property, or the proceeds thereof, still retained by the trustee, and converted to his own use.

The principle is laid down in *Burdick* v. *Garrick*. (1) In that case an agent was entrusted with property which he was authorized to sell and he was directed to invest the proceeds in the name of his principal. Under this authority he received certain moneys and paid them into his own account at his bank. Afterwards, in an action for an account, the agent pleaded the Statute of Limitations, but Lord Hatherley L.C. said: "How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see." And the Court held that the Statute of Limitations had no application. Giffard L.J. followed in the same sense, and stated the principle broadly in these terms (afterwards cited with approval by Lord Macnaghten in *Lyell* v. *Kennedy* (2)): "I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

In *Lyell* v. *Kennedy* (3), Lord Selborne, in deciding that the facts were sufficient to establish a fiduciary character against a manager of property who had received rents on behalf of a principal, said: "For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough."

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs, and that the accounts referred to the registrar be made up from April 1, 1898, when the special wire began to be used for unprivileged messages, until the discontinuance by the appellants of the use of such wire.

Solicitors for appellants: *Freshfields.*
Solicitors for respondents: *Bircham & Co.*

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(1) L. R. 5 Ch. 233.
(2) (1889) 14 App. Cas. at p. 463.
(3) 14 App. Cas. at p. 457.

[PRIVY COUNCIL.]

E. D. SASSOON & CO. . . . . PLAINTIFFS;

AND

WESTERN ASSURANCE COMPANY . . . . DEFENDANTS.

J. C.*
1912
April 23, 24;
May 17.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AT SHANGHAI.

Policy of Marine Insurance—Construction—Perils of the Sea—Cargo damaged by Leak caused by Rotten Condition of the Hulk.

Where opium stored on a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk unknown to the plaintiffs:—

Held, that the damage was not caused by the perils of the sea within the meaning of a time policy of insurance against marine risks.

The Xantho (1887) 12 App. Cas. 509, followed.

APPEAL from a judgment of the Supreme Court (January 28, 1911).

The claim of the appellants was for a loss under a contract of marine insurance and the question decided was whether the damage sustained was a loss caused by a peril insured against by the respondents.

The damage to the insured opium of the appellants was caused, as stated in their Lordships' judgment, by river water which percolated through a leak of the *Corea*, a wooden hulk used as a store.

The Court below found that the leak was occasioned by part of the timbers and particularly the treenails of the *Corea* having decayed from natural causes and lapse of time; that the decay was so entirely covered by the copper sheathing that, although the vessel was inspected by a competent marine surveyor every week, it was not and could not be detected; that the damage was not caused by anything unusual in the weather or state of the river, but by the natural decay of the vessel, and it held that the loss was not a loss by perils insured against.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

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Atkin, K.C., *Bailhache, K.C.*, and *W. N. Raeburn*, for the appellants, contended that they were entitled to recover. The insurance was on the goods and not upon the hulk. In respect of the opium the incursion of water into the hulk was a peril of the sea or ejusdem generis therewith and was a peril covered by the contract of insurance. That insurance was an insurance for time, and there was no warranty of the seaworthiness of the hulk. Even if the proximate cause of the damage to the goods was the natural decay of the hulk, it was contended that on the true construction of the contract that was a peril within the contemplation of both parties and was intended to be covered thereby. Reference was made to the Marine Insurance Act, 1906, s. 39, sub-s. 5, as to implied warranty: *Thompson* v. *Hopper* (1); *Fawcus* v. *Sarsfield* (2); *Dudgeon* v. *Pembroke.* (3)

Sir R. Finlay, K.C., and *F. D. Mackinnon*, for the respondents, contended that the loss was not occasioned by any peril of the sea insured against. The *Corea* had been moored as a fixture for many years in the river off the Canton Road jetty at Shanghai. She was there in perfectly smooth water and did not move. The evidence shewed that the leaking which occasioned the loss was the inevitable result of the decayed condition of the timbers of the *Corea*, a decay produced by natural causes inside its copper sheathing. The loss was not the result of any accident. The ship was unseaworthy, and unseaworthiness to the knowledge of the assured is a good defence. Reference was made to *Dudgeon* v. *Pembroke* (3), cited on the other side; *Merchants Trading Co.* v. *Universal Marine Insurance Co.*, reported in a note to *Anderson* v. *Morice* (4); *Magnus* v. *Buttemer* (5); *Paterson* v. *Harris* (6); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (7); *The Xantho.* (8)

Bailhache, K.C., replied, citing *Blackburn* v. *Liverpool Insurance Co.* (9)

(1) (1856) 6 E. & B. 172; S. C. 25 L. J. (Q.B.) 240.

(2) (1856) 6 E. & B. 192; 25 L. J. (Q.B.) 249.

(3) (1874) L. R. 9 Q. B. 581; (1877) 2 App. Cas. 284.

(4) (1870) 2 Asp. M. L. C. 431.

(5) (1852) 11 C. B. 876; 21 L. J. (C.P.) 119.

(6) (1861) 1 B. & S. 336.

(7) (1887) 12 App. Cas. 518.

(8) 12 App. Cas. 503.

(9) [1902] 1 K. B. 290.

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The judgment of their Lordships was delivered by

LORD MERSEY. This is an appeal from a judgment of His Majesty's Supreme Court for Shanghai, dated January 28, 1911, dismissing the plaintiffs' claim.

The facts of the case are as follows: The plaintiffs were the owners of a wooden hulk moored in the river Whangpoo, which they used as a store. In this hulk they placed some opium, on which they effected an insurance with the defendants against marine risks. The policy was a time policy running from July 6 to August 6, 1908. On July 20 the hulk sprang a leak and the opium was damaged by the percolating water. The leak was wholly due to the rotten condition of the hulk. The condition of the hulk was unknown to the plaintiffs, the weak place being covered up by some copper sheathing. In these circumstances the plaintiffs brought their action. The defendants by their plea denied that the damage to the opium was by the perils insured against. This denial raised the only question in the case.

The risks covered by the policy were the risks usually described in such a contract, namely, "perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . goods. It was not contended on the plaintiffs' behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the sea; but it was said that the loss was due to such a peril. The learned judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk, and he thereupon dismissed the action. Their Lordships are of opinion that the learned judge was right. There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell in *The Xantho*, reported in 12 App. Cas., where he says at p. 509: "I think it clear that the term 'perils of the sea' does not cover

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every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear."

An attempt was made during the argument to attribute a different meaning to the expression "perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said: "It would in my opinion be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments."

In this case the damage though doubtless proximately due to sea water was not in any sense due to sea peril. It does not therefore fall within the policy.

Their Lordships are of opinion that the appeal should be dismissed, and they will advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *W. A. Crump & Son.*

Solicitors for respondents: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

JAMES FAIRCLOUGH . . . . DEFENDANT;

AND

SWAN BREWERY COMPANY, LIMITED . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

J. C.*
1912
April 24, 25;
May 17.

Law of Mortgage—Mortgage cannot be made irredeemable—Mortgage of a Lease of Tied House not to be paid off till Lease nearly expired—Mortgagor entitled to redeem.

A mortgage cannot be made irredeemable, and equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption.

Where a mortgage of a lease for twenty years provided that without the mortgagee's written consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease:—

Held, that the mortgagor was entitled to redeem.

APPEAL from an order of the Full Court (April 19, 1911) varying a judgment of McMillan J. (November 18, 1910).

The question submitted was whether a clause set out in their Lordships' judgment in a mortgage deed by the lessee of an hotel to a brewery company precluding the lessee from redeeming his mortgage for the whole of the residue of the term for which the mortgagor held the hotel less a few weeks, being a period of more than seventeen years, and precluding him from purchasing beer, during the continuance of the security, from any person other than the mortgagees, were void as being a clog on the equity of redemption and in restraint of trade.

The appellant bought the hotel in December, 1907, from a vendor who held the same under a lease for twenty years from June 12, 1905, at a yearly rent of 520*l.* subject to a mortgage to the respondents on which 1500*l.* was due. The respondents refused to be paid off, insisting that 500*l.* should remain to cover the tied covenant upon the hotel which the vendor had given. The appellant on December 27, 1907, executed a mortgage for

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

500*l*. which contained the said clause; and accordingly the respondents refused to allow him to redeem except by the monthly instalments fixed by the mortgage deed.

On June 23, 1910, the respondents sued to recover damages for the appellant's breach of his covenant in the said mortgage deed to purchase from them ale, beer, and stout, an account of the ale, beer, and stout purchased by the appellant in breach of the said covenant, and an injunction to restrain him from committing any further breach thereof.

The appellant pleaded that the covenant was an unreasonable and unnecessary restraint of trade, was contrary to public policy and illegal, and was only binding during the continuance of the security created by the mortgage deed, and that the appellant ought to be allowed to redeem the said mortgage as he had already offered to do, and that the said covenant was a clog on the appellant's equity of redemption of the mortgaged premises and was null and unenforceable; and the appellant counterclaimed against the respondents for damages for the breach of covenant by the respondents to supply him with the ale, beer, and stout required by him, and for declaration that the covenant sued on by the respondents was invalid, and that the stipulations for continuance of the security were void, and for redemption of the mortgaged premises on payment of principal, interest, and costs.

McMillan J. found that the provisions in the mortgage deed which prevented the appellant from redeeming for seventeen and a half years were for the benefit of the respondents, and he held that they were void as being an unreasonable clog on the appellant's equity of redemption. He held that the appellant was entitled to redeem, and refused the injunction sought, holding that there was no breach after redemption had been refused.

The Full Court in appeal agreed with McMillan J. in his finding that the postponement of the period of redemption was for the benefit of the respondents in order to make sure that the hotel would remain a tied house, but held that the provisions in the mortgage deed preventing the appellant from redeeming the mortgage were not unreasonable. They accordingly rescinded the order declaring the appellant entitled to redeem and ordered that the appellant should be restrained during the continuance of the mortgage from any further breach of his covenant and that the respondents should recover damages for breaches already committed.

Danckwerts, K.C., and *P. F. Wheeler*, for the appellant, contended that the evidence established that the provisions in question contained in the mortgage deed were inserted wholly in the interests of the respondents and not of the appellant. It was unreasonable that the appellant should be prevented from redeeming the mortgage until a period of more than seventeen years had expired and his lease was on the point of coming to an end. It was contended that the terms and conditions upon which the appellant was required to take the beer supplied by the respondents were unreasonable and oppressive, and, moreover, that he was released from his covenant and from any disability to redeem by the respondents' failure to supply beer within the meaning of their covenant. But the main ground of appeal was that the provisions in question were void as a clog upon the appellant's equity to redeem and were void. They practically made the mortgage irredeemable during the subsistence of the appellant's lease, and as such they were entirely void. Reference was made to *Noakes* v. *Rice* (1); *Teevan* v. *Smith* (2); *James* v. *Kerr* (3); *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (4); *Bradley* v. *Carritt* (5); *Morgan* v. *Jeffreys* (6); *Brown* v. *Ryan* (7); *Biggs* v. *Hoddinott* (8); *Talbot* v. *Braddill.* (9)

Sir R. Finlay, K.C., and *E. Beaumont*, for the respondents, contended that there was no legal foundation for the contentions put forward by the appellant that the covenant by which his hotel had become a tied house was unreasonable and oppressive, and that the mortgage was for an unreasonable term and irredeemable and therefore void. All the arrangements for the mortgage and in particular the covenant to tie the trade binding the appellant to purchase from the respondents were made when the

(1) [1902] A. C. 24.
(2) (1882) 20 Ch. D. 724.
(3) (1889) 40 Ch. D. 449.
(4) [1904] A. C. 323.
(5) [1903] A. C. 253.
(6) [1910] 1 Ch. 620.
(7) [1901] 2 I. R. 653.
(8) [1898] 2 Ch. 307.
(9) (1683) 1 Vern. 183.

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appellant was entirely free from all influence on the respondents' part, and there was nothing unfair or unreasonable in them. The parties were at arm's length and dealing on equal terms. The provision for repayment by instalments was reasonable and not open to any legal objection. The mortgaged hotel could validly be tied to the respondents during the subsistence of the mortgage. The doctrine as to clogging an equity of redemption does not apply to the circumstances of this case. The provision relied on as a clog was not intended to endure after the obligation secured has been discharged, and while that obligation lasted the mortgagor was not entitled to his property freed therefrom. It was or might have been quite as beneficial to the mortgagor as to the mortgagee to pay by instalments at stated times as covenanted. There was nothing in the mortgage deed which was the result of any pressure by the respondents, and its terms were part of a bargain under which the appellant obtained the necessary consent of the respondents to his purchase of the lease. The Court below was right in thinking the case of *Morgan* v. *Jeffreys* (1) inapplicable, for there the contract was not mutual. They referred to *Cowdry* v. *Day* (2); *Brown* v. *Cole* (3); *Bovill* v. *Endle* (4); *Teevan* v. *Smith* (5); and *Salt* v. *Marquess of Northampton*. (6)

P. F. Wheeler replied.

1912
May 17.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. James Fairclough, a publican, the appellant in this case, became the registered proprietor of a lease of the Federal Hotel, Katanning, for the residue of a term of twenty years from June 12, 1905.

By an instrument of mortgage dated December 27, 1907, the appellant, therein called "the mortgagor," in consideration of the sum of 500*l.* lent to him by the respondent company, and in consideration of all moneys which might thereafter become owing by the mortgagor to the company for goods supplied, or for money lent or advanced, or on any other account whatever, did thereby for himself, his heirs, executors, administrators, and transferees, covenant with the company as follows: "That the mortgagor will pay to the company the said principal sum of 500*l.*, by 209 successive monthly instalments as follows, that is to say, 208 instalments of 2*l.* 8*s.* each, and one final instalment of 16*s.*, the first of such monthly instalments of 2*l.* 8*s.* to be paid on the 1st day of January next, and a subsequent instalment to be paid on the 1st day of every succeeding month thereafter until the whole of the said principal sum of 500*l.* shall be paid off, provided always that the mortgagor shall not be at liberty to pay off the said principal sum, except by the instalments, and at the times aforesaid, without the express consent in writing of the company on each occasion first had and obtained."

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(1) [1910] 1 Ch. 620.
(2) (1859) 1 Giff. 316.
(3) (1845) 14 Sim. 427.
(4) [1896] 1 Ch. 648.
(5) 20 Ch. D. 724.
(6) [1892] A. C. 1.

Then followed a covenant for payment of interest on the amount from time to time remaining unpaid, at the rate of 7*l.* per cent. per annum on the first day of every calendar month, and other covenants including a covenant stipulating in effect that during the continuance of the security the Federal Hotel should be a tied house in favour of the company. For better securing the payment in manner aforesaid of the said principal sum and interest, and all other moneys intended to be thereby secured, the mortgagor thereby mortgaged all his estate and interest in the Federal Hotel to the company.

It will be observed that the lease is made to expire on June 12, 1925, and that the instrument of mortgage provides that without the consent in writing of the company the mortgage debt of 500*l.* is not to be wholly paid off until May 1, 1925, that is just six weeks before the actual expiration of the lease.

In December, 1909, the company were prevented by accidental circumstances from supplying the appellant with beer in accordance with a covenant on their part contained in the mortgage deed. The appellant thereupon assumed to treat the tie as at an end, and obtained beer from other quarters. The company brought an action for damages and for an injunction. The appellant, who apparently had already offered to redeem, counterclaimed for redemption. McMillan J. gave judgment for the company in the action, and assessed the damages at 8*l.*

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On the counter-claim he gave judgment for the appellant, holding that by law he was entitled to redeem. On appeal to the Full Court an order was made in the action in favour of the company with a reference as to damages. The counter-claim was dismissed with costs. Hence the present appeal.

The arguments of counsel ranged over a very wide field. But the real point is a narrow one. It depends upon a doctrine of equity, which is not open to question.

"There is," as Kindersley V.-C. said in *Gossip* v. *Wright* (1), "no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction." The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned judges in the Full Court. But it is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The learned counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage cannot be made irredeemable. That is plainly forbidden. Is there any difference between forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is nugatory. The incumbrance on the lease the subject of the mortgage according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring, when redemption can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this mortgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself.

Their Lordships are therefore of opinion that the order of the Full Court should be discharged with costs, and the decision of

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(1) (1863) 32 L. J. (Ch.) 648, 653.

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McMillan J. restored. Their Lordships will humbly advise His Majesty accordingly.

The respondent company will pay the costs of this appeal.

Solicitors for appellant: *Trinder, Capron & Co.*
Solicitors for respondent: *W. H. & A. G. Herbert.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867—*Policy of the Act—Legislation authorizing the putting of Questions to the Courts—Intra vires both of the Dominion and the Provinces.*

In 1875, 1891, and 1906 Acts were passed by the Dominion Parliament authorizing the Executive Government of the Dominion to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact; and nearly all the provinces have passed Acts in similar terms requiring their own Courts to answer questions put by the provincial Governments:—

Held, that it was intra vires of the respective Legislatures to impose this duty on the Courts. Though powers to that effect were not granted in express terms by the British North America Act, 1867, they were not repugnant thereto, but incidental to the complete self-government of Canada which was contemplated by that Act. The answers are only advisory, and by giving them it cannot be said that a Court ceases to be such a judiciary as the Act provides for.

APPEAL from a judgment of the Supreme Court of Canada (October 11, 1910), reported in 43 S. C. R. 536, dismissing a motion to strike the inscription of this and two other references from the list upon the ground of want of jurisdiction.

The question raised by the appeal was whether under the

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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Canadian Constitution the Governor-General in Council has power to frame and refer to the Supreme Court questions as to the constitutional powers of the provinces, as to the effect of provincial statutes, and as to the interests of individuals who may be unrepresented upon such reference, and to require the Supreme Court to answer such questions.

The appellants contended that the Governor-General in Council had no such power, and that the reference in question, which so far as material to this appeal related to the powers inter se of the Dominion and provincial Legislatures to incorporate companies, and to the effect of such incorporation having been made without the consent and against the protest of the provinces concerned, could not be entertained by the Supreme Court.

The particular reference now in question was made by the Governor-General to the Supreme Court of Canada for hearing and consideration of certain questions of law in relation to the incorporation of companies and other particulars as therein stated. It was made under the authority of s. 60 of the Supreme Court Act, R. S. C., 1906, c. 139, which is as follows:—

"60. Important questions of law or fact touching,—

"(*a*) the interpretation of the British North America Acts, 1867 to 1886; or

"(*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or,

"(*c*) the appellate jurisdiction as to educational matters, by the British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or,

"(*d*) the powers of the Parliament of Canada, or of the Legislatures of the provinces, or of the respective Governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

"(*e*) any other matter, whether or not in the opinion of the Court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question."

Various sub-sections follow which prescribe the mode of dealing with the reference so made, and sub-s. 6 enacts:

6. "The opinion of the Court upon any such reference although advisory only shall for all purposes of appeal to His Majesty in Council be treated as a final judgment of the said Court between parties. 54 & 55 Vict. c. 25, s. 4; 6 Edw. 7, c. 50, s. 2."

The Attorney-General of each of the provinces was notified of the hearing of this reference pursuant to an order of Idington J.

The original Supreme Court Act was passed in 1875, being 38 Vict. c. 11. It was re-enacted in substance in 1886 by R. S. C., 1886, c. 135, amended in 1891 by 54 & 55 Vict. c. 25, and again by 6 Edw. 7, c. 50, and finally re-enacted by R. S. C., 1906, c. 139.

The said order of dismissal was made by a Full Court (Fitzpatrick C.J., Davies, Duff, and Anglin JJ., Girouard and Idington JJ. dissenting).

The Chief Justice was of opinion that the Court should entertain the reference and answer the questions on the grounds: (*a*) That precedent had been established therefore by the numerous previous cases in which the Court had answered such questions in the past, some of the answers to which had been appealed to the Judicial Committee of the Privy Council, which assumed that it had jurisdiction to deal with them; (*b*) that independently of precedent it was the duty of the judges of the Supreme Court of Canada to advise the Executive Government in analogy to the procedure by which the judges in England have often been called to give their opinions on points of law; that this was sufficiently provided for by s. 3 of the Supreme Court Act by which the Court was established under the authority of s. 101 of the British North America Act, 1867, by the Parliament of Canada "as a general Court of Appeal for Canada and as an additional Court for the better administration of the laws of Canada," and that, quoting the words of the Chief Justice, "we are asked to answer certain questions submitted to us by the Executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian Constitution, the British North America Act"; (*c*) that as to the constitutionality of the provisions of the Supreme Court Act under which the references were made, Parliament had the necessary legislative jurisdiction under s. 91 of the British North America Act, 1867, which provides that the Parliament of Canada may from time to time make laws for the peace, order, and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces; and that if Parliament possess the power, that power is vested in the Executive.

Davies J. agreed with the Chief Justice in thinking that s. 60 of the Supreme Court Act was authorized by s. 101 of the British North America Act as being the establishment of an additional Court for the better administration of the laws of Canada, and that in any event it was authorized by the general provision of s. 91. He considered that there was no necessary conflict between the powers assigned to the provincial Legislatures under s. 92, sub-s. 14, of the British North America Act and the power claimed by the Dominion of Canada to refer questions to the Supreme Court under s. 60 of the Supreme Court Act, and further, that even if there was any such conflict the words "Notwithstanding anything in this Act," at the beginning of s. 101 of the British North America Act, indicate that it was the intention of the Imperial Parliament to override s. 92, sub-s. 14, by s. 101.

The opinions of Duff and Anglin JJ. were substantially to the same effect.

Girouard J. was of opinion that the jurisdiction of the Court in references by the Governor-General was confined to Federal matters, and that in so far as the subject-matter of this reference was provincial it was ultra vires of the Governor-General in Council and beyond the jurisdiction of the Court.

Idington J. was of opinion that s. 101 of the British North America Act, besides authorizing the establishment of a general Court of Appeal for Canada, authorized the creation of additional

Courts for the better administration of Federal laws. He held that whilst the Supreme Court had jurisdiction in references in which both the provinces and the Dominion have agreed in submitting the questions asked, it had no jurisdiction to entertain references by the Dominion authorities of questions affecting the provinces without their consent and against their wish.

On March 4, 1911, an Order in Council granted special leave to appeal against the said opinion or judgment. The appellants were the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, and Alberta. The respondents were the Attorney-General for the Dominion and the Attorney-General for the Province of British Columbia. The latter of the two did not appear.

Sir R. Finlay, K.C., *Nesbitt, K.C.*, and *Geoffrey Lawrence*, for the appellants, contended that the Governor-General in Council had no power to refer to the Supreme Court questions which affect the interests of the provinces without obtaining their consent to such reference. On the true interpretation of the British North America Act, 1867, it appears that s. 91, sub-s. 27, and ss. 96—101 expressly and exhaustively define the powers of the Dominion Parliament as to the administration of justice. It is inadmissible to imply further powers and regard those further powers as vested by the statute in the Court. If s. 60 of the Supreme Court Act (R. S. C., 1906, c. 139) authorizes the reference in question it is ultra vires of the Dominion Parliament. That Act and its predecessors constituted the Supreme Court as a general Court of Appeal for Canada. Sect. 60, however, purports to create a Court not as a general Court of Appeal nor for the administration of the laws of Canada, but as a branch of the Executive Government, an advisory committee for the purpose of advising the Executive upon any question which the Governor-General sees fit to refer to it. The giving of such advice is no part of the administration of the law, and it would necessarily include, inter alia, advice upon the legislation of the Imperial Parliament and of the various provincial Legislatures in Canada. So far from aiding in the administration of law it may easily be so used as to hamper and interfere with that administration. The points

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involved in such references may afterwards arise in the course of legal proceedings between private suitors or between the provinces and the Dominion. The duty would then be cast on the provincial Courts and ultimately on the Supreme Court of deciding such points according to law. It was contended that it would or might be highly prejudicial to the administration of justice that the members of the Supreme Court should have been previously required to express opinions upon any such points until they actually arose for adjudication and had been argued before them. It was contended that the Dominion Parliament had no power to impose upon the Supreme Court the obligation to express extra-judicial opinions on matters which might thereafter come judicially before them. The obligation is inconsistent with the primary duty of the Court and the purpose for which it was created, namely, the administration of law. So far as that administration is impeded or overridden by the obligation imposed by s. 60 the Court ceases to be such a judiciary as the Constitution provides for, and it was ultra vires of the Dominion so to enact. The appellants on behalf of the provinces contended that that obligation conflicts with the powers assigned to provincial Legislatures by s. 92, sub-s. 14, of the British North America Act, 1867. Under that sub-section everything which relates to the administration of justice in the province is assigned exclusively to the Legislature of the province. It is not competent for the Dominion to interfere therewith under the authority of the general power of its Parliament to make laws for the peace, order, and good government of Canada. The scope and intention of that Act of 1867 was to effect a division of legislative powers between the Dominion and the provinces, giving to each as far as possible exclusive legislative authority in its own sphere. In the absence of express words it could not have been intended that either the Dominion or the provinces should have the power of calling in question the legislative competency of the other by referring to the Courts of law hypothetical or other questions framed ex parte.

The questions propounded in this reference were designed to obtain the opinion of the Supreme Court on the question whether companies incorporated under provincial statutes have power or capacity to do business outside the limits of the incorporating province. It was contended that the answers to such questions would or might affect the standing of a great number of companies incorporated by the provinces since the confederation in 1867 and now carrying on business in two or more provinces. They might also affect the legislative control over companies incorporated in the several provinces prior to their entry into confederation. These are obviously questions of vital importance to the appellants, who were not consulted as to the framing of them. Previous references had been made with the consent of the provinces, and so the question of jurisdiction had never before been raised or decided.

With regard to the practice which has obtained in England of putting questions upon matters not in litigation to the Judicial Committee, the House of Lords, and His Majesty's judges, and which was relied upon by the judges of the Supreme Court, it was contended that that practice had grown up under an unwritten Constitution, whereas the validity of the practice which had grown up in Canada depends upon the construction of a written Constitution, namely, the British North America Act, 1867, and the Supreme Court Acts. With regard to the House of Lords and His Majesty's judges the cases referred to were *In re Westminster Bank* (1); *M'Naghten's Case* (2); *O'Connell* v. *Reg.* (3) The practice observed in those cases afforded no guide to the construction of the British North America Act, although 3 & 4 Will. 4, c. 41, s. 4, seems to have suggested its introduction into Canada. The practice which has grown up under the British North America Act and the various Acts constituting the Supreme Court is more important, and it was contended that on examination it resulted that every previous reference under s. 60 of the Act of 1906 or its corresponding predecessor in the earlier Acts had been made with the consent of the provinces concerned. In consequence the question of jurisdiction raised in this case had not previously been submitted or decided. The cases referred to were *In re Sproule* (4); certain references as to the status of the Supreme Court of British Columbia and under the Liquor Laws Amendment Act, 1883, s. 26, to be found in Coutlée's Supreme Court

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(1) (1834) 2 Cl. & F. 191.

(2) (1843) 10 Cl. & F. 200.

(3) (1844) 11 Cl. & F. 155.

(4) (1886) 12 Can. S. C. R. 140.

Digest, vol. 1, col. 273 and col. 797; *In re County Courts of British Columbia* (1); *In re Certain Statutes of the Province of Manitoba relating to Education* (2), and on appeal, *Brophy* v. *Attorney-General of Manitoba* (3); *In re Prohibitory Liquor Laws* (4), and on appeal, *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (5); *In re Provincial Fisheries* (6), and on appeal, *Attorney-General for the Dominion* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (7); *In re Representation in the House of Commons* (8) and *In re Representation of P.E.I. in the House of Commons* (9), and on appeal, *Attorney-General for Prince Edward Island* v. *Attorney-General for the Dominion* (10); *In re Railway Act* (11), and on appeal, *Grand Trunk Railway of Canada* v. *Attorney-General of Canada.* (12) Reference was also made to *In re Criminal Code Sections relating to Bigamy* (13) and *In re Criminal Code* (14); to an Australian case, *McLeod* v. *Attorney-General for New South Wales* (15); *In re Legislation respecting Abstention from Labour on Sunday* (16), citing *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (17); *In re International and Inter-provincial Ferries* (18); and to *L'Association St. Jean Baptiste de Montreal* v. *Brault.* (19) With regard to any analogy presented by the American Constitution, the President has the right to require the written opinion of his ministers, but not in regard to the judicial department, which is bound to abstain from extra-judicial opinions upon points of law even though solemnly requested by the Executive: see Story on the Constitution of the United States, s. 1571, note 2, and *Marbury* v. *Madison.* (20) Sect. 91 of the British North America Act, 1867, gives to the Dominion wide general powers, but it was contended that they must be read so as to harmonize with

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(1) (1892) 21 Can. S. C. R. 446.
(2) (1894) 22 Can. S. C. R. 577.
(3) [1895] A. C. 202.
(4) (1895) 24 Can. S. C. R. 170.
(5) [1896] A. C. 348.
(6) (1895) 26 Can. S. C. R. 444.
(7) [1898] A. C. 700.
(8) (1903) 33 Can. S. C. R. 475.
(9) (1903) 33 Can. S. C. R. 594.
(10) [1905] A. C. 37.
(11) (1905) 36 Can. S. C. R. 136.
(12) [1907] A. C. 65.
(13) (1897) 27 Can. S. C. R. 461.
(14) (1910) 43 Can. S. C. R. 434, 441.
(15) [1891] A. C. 455.
(16) (1905) 35 Can. S. C. R. 581.
(17) [1903] A. C. 524.
(18) (1905) 36 Can. S. C. R. 206.
(19) (1901) 31 Can. S. C. R. 172.
(20) (1803) 1 Cranch. 137, 171.

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s. 101, which is almost identical with provisions in the American Constitution.

E. L. Newcombe, K.C., and *Atwater, K.C.*, for the Dominion of Canada, contended that the judgment of the Supreme Court was right. The reference to the Supreme Court and this appeal simply involve a question of jurisdiction derived from the enacting clauses of the British North America Act. In other words, it was contended that s. 60 of the Supreme Court Act is within the legislative authority of the Dominion Parliament under the British North America Act, either under s. 91 or s. 101. The powers conferred by s. 60 did not conflict in any way with the powers and rights reserved exclusively to the provincial Legislatures by s. 92 of the Act of 1867. The legislation of the Parliament of Canada authorizing the reference of questions in the manner adopted in this case has been in force ever since the constitution of the Supreme Court in 1875: see 38 Vict. c. 11, s. 52. The power so conferred has been acted upon in many cases, as shewn by the authorities cited on the other side. There has thus arisen a long series of precedents already laid before the Board for the answering of such questions not only by the Supreme Court, but also on appeal by the Judicial Committee. Reference was also made to *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*. (1) *Grand Trunk Pacific Ry. Co.* v. *Rex*, decided last month (2), was referred by the Governor-General of Canada. Further similar legislation has been enacted by the provincial Legislatures, or most of them, authorizing the provincial Governments to put questions of law or fact otherwise than by litigation to the chief Courts of jurisdiction within their respective provinces. Reference was made to Revised Statutes of Nova Scotia, vol. 2, c. 166, p. 709, entitled Of the Decision of Constitutional and other Provincial Questions; to Revised Statutes of Ontario, 1897, c. 84; Revised Statutes of Quebec, 1909, vol. 1, arts. 579—583; New Brunswick Cons. St. 1903, c. 18; New Brunswick Judicature Act, 1906; Acts of 1909, c. 5, s. 16; Revised Statutes of Manitoba, 1902, c. 33; Revised Statutes of British Columbia, 1911, c. 45; R. S. Saskatchewan, c. 57. Reference was also made to cases from the provinces where the authority to put the questions was undisputed while the duty of the Court to answer them was sometimes brought under discussion. See *In re Legislation respecting Abstention from Labour on Sunday* (1), where Blackstock, K.C., raised objections to the hearing of the questions, p. 587, but not to the power of Parliament to authorize the putting of them. See also *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (2) and *Attorney-General for the Dominion* v. *Attorney-General for Ontario.* (3)

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(1) [1907] A. C. 65.

(2) See p. 204, ante.

There is no inconvenience resulting from the practice of the judges giving advisory opinions. On the contrary it is a proceeding of utility, if not a necessity, in the determination of the various constitutional difficulties arising in the construction of the British North America Act. Advisory jurisdiction is within the functions of a Court of law, which need not be for all purposes indistinguishable from a Court of justice: see judgment of Fry L.J. in *Royal Aquarium, &c., Society* v. *Parkinson.* (4) Reference was also made to the judgment of Dr. Lushington in *In re Schlumberger* (5), as to questions referred under 3 & 4 Will. 4, c. 41. See also *Ex parte County Council of Kent and Council of Dover* (6); *Crown Grain Co., Ld.* v. *Day.* (7) As to the construction of the general powers given to the Dominion Parliament by s. 91 of the Act of 1867, see *Valin* v. *Langlois* (8); *Bank of Toronto* v. *Lambe* (9); *Brophy* v. *Attorney-General of Manitoba.* (10) The Court, if it considered that its answers to the questions put might prejudicially affect the administration of justice in future cases, might refuse to answer the questions, stating their reasons for so doing, or the Legislature might modify its enactment. The appellants had failed to shew that it was ultra vires of the Dominion Parliament to authorize the Executive Government to put the questions purporting to be authorized by s. 60.

Sir R. Finlay in reply.

(1) 35 Can. S. C. R. 581.
(2) [1903] A. C. 524.
(3) [1898] A. C. 247.
(4) [1892] 1 Q. B. 431, 446.
(5) (1853) 9 Moo. P. C. 1, 12.
(6) [1891] 1 Q. B. 728, 729.
(7) [1908] A. C. 504.
(8) (1879) 5 App. Cas. 115, 118.
(9) (1887) 12 App. Cas. 575, 579.
(10) [1895] A. C. 202, 222.

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The judgment of their Lordships was delivered by

Earl Loreburn L.C. The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament. Much care and learning have been devoted to the case, and their Lordships are under a deep debt to all the learned judges who have delivered their opinions upon this anxious controversy.

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.

In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less

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than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial Legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

Broadly speaking the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights.

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This view, which was most powerfully presented, has a two-fold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power.

Is it then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the 101st section the Dominion is enabled to establish a Supreme Court of Appeal from the provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the provincial Courts. But of any power to ask the Court for its opinion there is no word in the Act. All depends upon whether such a power is repugnant to that Act. The provinces by their counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is intended to be similar, as recited in the British North America Act, 1867. And they say that to place (1) the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it, or with the free access to an unbiassed tribunal of appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for. The argument on behalf of the provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is ultra vires.

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(1) *Sic.*

In course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, by the House of Lords, and His Majesty's judges.

It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the 4th section of the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the 4th section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand it must be remembered that the members of the Judicial Committee are all Privy Councillors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatized as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that, when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the judges and to ask of them such questions as it may think necessary for the decision of a particular case. That

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is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords possesses in its legislative capacity a right to ask the judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some fifty years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a similar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

Very little assistance is afforded by the almost or altogether obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board.

It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

The first step towards authorizing the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act, any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed providing for the same thing with more detail though not in wider terms, and it is the 1906 Act which gave rise to the present appeal. Between 1875 and to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance with these Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such appeals, as though they were appeals from the ordinary jurisdiction. In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals. These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorney-General as shewing that the Acts now alleged to have been ultra vires were in fact acted upon, and so treated as valid, not only by the Court in Canada, but also on appeal in Whitehall. It was urged on the other hand for the provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained from what is due to the independence and character of Courts of justice. It is clear indeed that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

Great weight ought also to be attached to another significant circumstance. Nearly all the provinces have themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that s. 101 of the British North America Act forbids this being done by the Dominion Parliament, that argument cannot apply to the provincial Legislatures, because s. 101 does not apply to the provinces. Either, then, these provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the provincial Acts as well as that of the Dominion are ultra vires upon the general ground already dwelt upon, that a Court of justice ceases in effect to be a Court of justice when such a duty is laid upon it. Certainly it is remarkable that for thirty-five years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has been tranquilly acted upon without question by the Legislatures of the Dominion and provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada. It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e.g., must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have thought of saying it was ultra vires. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinions of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

Yet the argument, that to put questions is ultra vires, must be the same whether the power is rightly or wrongly used. If you say that it is intra vires to put some kinds of question, but ultra vires to put other kinds of question, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people, and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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May 15, 16; June 18.

MIKE KRZUS . . . . APPELLANT;

AND

CROW'S NEST PASS COAL COMPANY, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

British Columbia Workmen's Compensation Act, 1902—*English Workmen's Compensation Act*, 1897—*Construction—Claim to Compensation—Non-resident Widow of Alien Workman.*

Held, reversing the judgment of the Court below, that under the British Columbia Workmen's Compensation Act, 1902 (which is practically identical with the Workmen's Compensation Act of 1897 of the United Kingdom), the widow of an alien workman who lost his life by an accident in the course of his employment by the respondents was entitled to compensation as a dependant of the deceased, notwithstanding that she was residing in a foreign country at the dates both of the accident and the death; and that the appellant as the legal personal representative of the deceased was entitled to payment thereof in trust for her.

APPEAL from a judgment of the Court of Appeal (April 28, 1911) reversing a judgment of Clement J. (November 23, 1910) upon a case stated by an arbitrator in an award made under the British Columbia Workmen's Compensation Act, 1902.

The question decided was whether that Act extends to dependants who are aliens residing in a foreign county.

The appellant as the legal personal representative of Albert Krzus, a workman employed by the respondents in their mine in British Columbia, who was killed by an accident in the course of his employment, applied for compensation under the Act on behalf of the widow of the deceased, who resided in Austria at the time both of the accident and of the application and was not a British subject. The arbitrator, to whom in accordance with the Act the claim was referred, submitted the questions set out in their Lordships' judgment. Clement J. decided in favour of

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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the claim, but the Court of Appeal by a majority reversed this decision.

Macdonald C.J. and Galliher J. held that alien dependants resident abroad were not within the purview of the Workmen's Compensation Act. They considered that the scheme of the Act was to shift the onus of providing for the destitute from the State to the employer, and, as non-resident aliens could not become a burden on the State, it ought not to be inferred, notwithstanding the general language of the Act, that the Legislature intended to impose an obligation on the employer to compensate aliens.

Irving J., who dissented, held that the Act applied. It was sufficient that the accident occurred within the jurisdiction to a workman employed there by an employer subject to provincial legislation; and no distinction could be drawn between the present case and that of a workman leaving dependants who are British subjects resident in an adjoining province.

Joseph Martin, K.C., and *L. P. Eckstein*, for the appellant, contended that the policy of the Act in question was primarily to benefit the workman by relieving him from the burden of providing against some of the consequences to himself and his family of serious accidents and by transferring that burden to the employer. There is no reason for distinguishing between those workmen who have and those who have not wives or other dependants resident in British Columbia. No such distinction is contained or implied in the Act, and the Legislature must have known that aliens as well as British subjects work in the mines, and if it had intended the distinction to be made would have so directed in express words. Sect. 4 of the Act provides that the appellant as the legal personal representative of the deceased should receive the payment of the compensation due.

Sir R. Finlay, K.C., *Rowlatt*, and *S. Herchmer*, for the respondents, contended that on its true construction the Act of 1902 did not cover the case of a dependant residing out of the Province of British Columbia. It did not apply to the case of an alien workman leaving alien dependants resident abroad. Compensa- was directed by the Act (see s. 2, sub-s. 1) to be paid in accordance

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with the First Schedule thereto; and the provisions in the Second Schedule (see s. 8 thereof) for the registration of a memorandum of award on their true construction shew that only the case of dependants actually resident in the province was contemplated by the Act. Reference was made to *Jefferys* v. *Boosey* (1) as to a foreigner's interest in copyright and the extent to which his rights therein are protected by 8 Anne, c. 19; *Tomalin* v. *S. Pearson & Son, Ld.* (2), a case under the Workmen's Compensation Act, 1906; *Gyorgy* v. *Dawson* (3), a case under s. 2 of R. S. O., 1897, c. 166, where the administrator of a foreigner was held entitled to sue on behalf of deceased's family. It was contended that in the absence of express words in the Act of 1902 the appellant could not sustain and enforce his claim in this case.

Counsel for the appellant were not heard in reply.

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of Appeal for British Columbia dated April 28, 1911, reversing a judgment of Clement J. upon a case stated by an arbitrator under the provisions of the British Columbia Workmen's Compensation Act, 1902.

The facts of the case are few and simple. The defendant company had in their employment at Fernie, in the Province of British Columbia, a workman who was an alien, an Austrian subject named Albert Krzus. While in this employment he met with an accident by which he lost his life. It is admitted that this accident was an accident "arising out of and in the course of his [the deceased's] employment," withing the meaning of the above-mentioned statute. He was a married man. His wife, now his widow, resided at the time the accident occurred, and still resides, in Austria, and was, like her deceased husband, an Austrian subject.

The appellant is the legal personal representative of the deceased, and resides in the Province of British Columbia. As such representative he in the interest of the widow, as a

(1) (1854) 4 H. L. C. 815.

(2) [1909] 2 K. B. 61.

(3) (1906) 13 Ont. L. R. 381.

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dependant of her deceased husband, made an application for compensation under the above-mentioned statute. The arbitrator before whom the application came, in exercise of the powers conferred upon him by the 4th section of the Second Schedule to the Act, submitted on September 28, 1910, in the form of a case stated, for the decision of a judge of the Supreme Court of British Columbia, the three following questions:—

"1. Can the applicant, who is the legal personal representative of the deceased workman, and who is resident in the Province of British Columbia, obtain an award for compensation under the Workmen's Compensation Act, 1902, the dependant of the deceased being an alien residing in a foreign country at the time of the accident out of which the claim for compensation arose and at the time of the death of the deceased workman and ever since?

"2. Can such legal personal representative in such circumstances enforce payment to him of compensation so awarded by an action on the award?

"3. Can such legal personal representative in such circumstances enforce payment of the award pursuant to section 8 of the Second Schedule of the Workmen's Compensation Act, 1902?"

Clement J. answered the first of these questions in the affirmative, and declined to answer the others. The statute with which he was dealing is practically identical with the statute of the United Kingdom, the Workmen's Compensation Act of 1897, save that the duties imposed upon the Registrar of Friendly Societies by s. 3 of the latter are imposed upon the Attorney-General of the province by s. 4 of the former. The widow of the deceased admittedly comes within the definition of dependants contained in both statutes; and the sole question for decision on this appeal, therefore, is, whether the fact that the widow is an alien resident in Austria prevents the plaintiff, as legal personal representative of the deceased, from recovering compensation under the provincial Act, since he would hold it, if recovered, for her benefit. It is not disputed that if the widow had been resident in British Columbia at the time of the accident and up to the date of the inquiry before the arbitrator this objection could not have been raised. It is her present residence outside the province, not the fact that she is an alien, that it is urged disqualifies her. Their Lordships did not understand it to be contended that if she had been resident at the periods above mentioned, and compensation had been awarded in respect of the loss she had sustained, she would have been bound to refund any of the sum awarded if she had subsequent to the award gone to reside outside the province. Nor was it contended that if the workman had been injured only, not killed, the compensation in the shape of a weekly sum payable to him during his total or partial incapacity for work would have been forfeited, or should be terminated, upon his going to reside in Austria. Yet, if the principle upon which the decision of the majority of the Court of Appeal, consisting of the Chief Justice and Galliher J., appears to be based was sound, these results should logically follow from the change of residence by the widow and her husband respectively. That principle was, by the Chief Justice, thus stated: "The Workmen's Compensation Act," he said, "is in its nature domestic or municipal, and it may be regarded as a shifting of what one might call (though strictly not one) a duty, namely, to provide for the destitute, from the State to the employer. This province owes no such obligation to aliens abroad; these could not become a burden upon the State or upon private charity in the State; hence, I think, no intention ought to be inferred to impose obligations on employers beyond that essential to accomplish what would appear to be the Legislature's intention. Or to put it in another way, that the general words used in the Act relied upon as including foreign dependants must be limited by reference to what the Legislature may fairly and reasonably be considered to have had in contemplation."

Further on in his judgment the learned Chief Justice said: "There is very little internal evidence of the Legislature's intention in this behalf to be found in the Act, but I think that s. 8 of the Second Schedule furnishes some, although perhaps only slight, evidence that those who enacted this legislation never had in contemplation as a person entitled to be awarded compensation any one other than a resident of the province."

The provision to which the learned Chief Justice referred in this latter passage is that requiring that when the amount of compensation under the Act is ascertained, or any weekly payments varied, or any other matter decided under the Act by a committee, an arbitrator, or by an agreement, a memorandum thereof is to be sent to the registry of the county for the district in which any person entitled to such compensation *resides*, who on being satisfied of its genuineness shall record the memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment. This provision is copied from the corresponding section of the Second Schedule of the statute of the Imperial Parliament of 1897. The words supposed to indicate that the benefits of the Act are to be confined to residents, namely, the words "for the district in which any person entitled to such compensation resides," are omitted from the corresponding section of the Second Schedule of the latest statute of the Imperial Parliament dealing with the subject, the Workmen's Compensation Act of 1906. Nothing is stated as to the applicability of this provision of the Act of British Columbia to the condition of things existing in that province, nor is it stated whether any rules of Court have been made prescribing how the provisions of the section are to be carried out; but in any event these provisions constitute merely the machinery for making the memorandum mentioned enforceable as a county court judgment, and, strange to say, this itself is immediately followed in the schedule to the Act of 1897 by a section which appears to be somewhat inconsistent with it. Sect. 9, not copied into the schedule to the statute of the province, requires that when any matter under the Act is to be done in a county court, or by or before the judge or registrar of a county court, then, unless the contrary intention appear, it is to be done in or by or before the judge or registrar of the county court of the district in which all the parties concerned reside, or, if they reside in different districts, the district in which the accident occurred. In addition, the words "any person entitled to such compensation resides," occurring in s. 8 of this schedule, may well only apply to the legal personal representative of a deceased workman where there is one, because in the definition clause it is provided that any reference to a workman

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when he is dead shall include a reference to his legal personal representative or his dependants or other person entitled to whom compensation is payable. And s. 4 of the First Schedule of the statute of 1902 enacts that "the payment shall in case of death be made to the legal personal representative of the workman, or if he has no legal personal representative to or for the benefit of his dependants," &c. If there be a personal representative he is the person to whom the compensation must be paid as trustee, no doubt, for those entitled to it beneficially, the dependants. If there be several dependants, as there often are, they may be resident in different districts, some within and some without the province to which the statute applies. In such a case some person must sue in a representative capacity, and it would appear to be sufficient if the person who sued was resident within the province, since the words of the section are not "every person entitled to the compensation," but "any person entitled to such compensation." No one person could in such a case be entitled to all the compensation unless it be the person claiming as representative of all those entitled to share in it. Again, the principle adopted by the Chief Justice would, where there were several dependants, only one of whom was resident within the province, exclude those resident elsewhere from any share in the compensation, since none of them could become a burden on the public or private charity of the province—a result one would think greatly opposed to the intention and purpose of the Legislature.

The only authority upon which the learned Chief Justice relied is the passage from Maxwell on the Interpretation of Statutes, p. 213, cited by the Master of the Rolls in his judgment in *Tomalin* v. *S. Pearson & Son, Ld.* (1), and the case of *Jefferys* v. *Boosey.* (2) This latter was a case on the law of copyright and dealt with the exclusive right claimed by the assignee of the assignee of the composer Bellini to print for sale in England copies of this composer's opera of "La Sonnambula." The case has not, in their Lordships' view, any application to the present case.

The passage cited from Maxwell on Statutes runs thus: "In

(1) [1909] 2 K. B. 61.

(2) 4 H. L. C. 815.

the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

The principle embodied in the passage was directly applicable to the case in which it was cited, because there it was sought to apply a statute of the United Kingdom to an accident happening in Malta, arising out of an employment carried on in Malta. So to apply the statute would, indeed, amount to making it operate beyond the territorial limits of the United Kingdom. And the Court of Appeal held, quite rightly in their Lordships' view, that this statute did not apply to such an employment; but no attempt is made in the present case to do anything of that kind. Here it is not insisted that the provincial statute shall operate extra-territorially. It is insisted that by its express words it imposes on the employer a liability to compensate his workmen for personal injuries by accident arising out of and in the course of the employment which he carries on, and in which they work. Where that employment is carried on in the Province of British Columbia, one of the results of this intra-territorial operation of the statute may, the respondents admit, possibly be that in some cases a non-resident alien may derive a benefit under it, but their Lordships think that if the liability thus expressly imposed is to be cut down at all, or if the employer is to be relieved from it to any extent, this must be done either by some provision of the statute itself or of the schedules attached to it, either expressed or to be clearly implied, and not by conjectures as to the policy of the Act not suggested by its language.

It is admitted that this case does not come within the expressed exceptions contained in the statute. If so the employer is, by the terms of the statute, made liable to pay the compensation in accordance with the First Schedule. When one turns to that schedule one finds that in cases where death results from the injury, and the workman leaves behind him dependants wholly or partly dependent upon his earnings, the amount of the compensation not exceeding in any case $1500 is to be paid. In one case and only one case is this limit of the compensation cut down or altered, namely, where he leaves no dependants. Then the reasonable expenses of his medical attendance and burial not exceeding $100 are alone to be paid.

In *Baird* v. *Birsztan* (1) it was assumed that the widow of an alien workman who was herself an alien resident abroad was entitled to recover; and, as Irving J. pointed out in his dissenting judgment in the Court of Appeal, it was decided in the case of *United Collieries Co.* v. *Simpson* (2) that where the workman's death resulted from the accident, and he left as his sole dependant a mother who died before she made any claim, her executrix was entitled to recover the compensation to which she became entitled on her son's death. On the principle adopted by the Court of Appeal in the present case this decision should have been otherwise, as the dependant being dead she never could become a burden on the public or private charity of this country. On the whole case then their Lordships are of opinion that the judgment of the Court of Appeal was erroneous and should be reversed, and that the answer given by Clement J. was correct in law, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Armitage, Chapple & Macnaghten.*

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(1) (1906) 8 F. 438.

(2) [1909] A. C. 383.

[PRIVY COUNCIL.]

RICHARD J. KIRBY . . . . DEFENDANT;

J. C.*

1912

May 16; June 18.

AND

JOHN J. COWDEROY . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Possession of Land by Mortgagee—Payment of Taxes a sufficient Act of Possession under the Circumstances.

Possession of land must be considered in every case with reference to its peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might reasonably be expected to follow with due regard to his own interest.

The Lord Advocate v. *Lord Lovat* (1886) 5 App. Cas. 273, 288, followed.

Quære as to the effect of a statutory provision that conveyances shall be construed to include the possession of the grantor.

Under a deed of conveyance, intended to be security only, dated July 1, 1889, of wild land in British Columbia without value, the appellant for over twenty years before the respondent's suit for redemption performed the only act of possession of which it appeared to be capable, namely, he paid with the respondent's acquiescence all the taxation upon it, and the respondent made no payment of either principal or interest and had repudiated all connection with the property:—

Held, that the suit to redeem was barred by R. S. B. C., 1897, c. 123, s. 40.

APPEAL from a judgment of the Court of Appeal (June 6, 1911) reversing a judgment of Hunter C.J. (January 26, 1911).

The respondent sued to redeem the land in suit and for a declaration that his conveyance thereof dated July 1, 1889, to the appellant was a mortgage. The appellant pleaded that the conveyance was not intended merely as a security, that the respondent had abandoned the property, and relied on the Statute of Limitations, R. S. B. C., 1897, c. 123.

Hunter C.J. held that the conveyance was absolute and that the respondent had abandoned his claim. He accordingly dismissed the suit.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

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The Court of Appeal held that the deed of July 1, 1889, was intended to be a mortgage to secure the repayment of $750 with interest at 7 per cent. per annum, and decreed that the respondent was entitled to redeem. As regards the Statute of Limitations it held that the appellant never obtained possession of the land within the meaning of the statute.

Davis, K.C., and *Malcolm M. Macnaghten*, for the appellant, contended that the judgment of Hunter C.J. was right and that the respondent was barred by limitation. They referred to R. S. B. C., 1897, c. 123, s. 40, and also to ss. 16 and 36, and to the Land Registry Act, R. S. B. C., 1888, c. 67, ss. 18 and 19; also to *Lindsay Petroleum Co.* v. *Hurd.* (1)

Macdonald, for the respondent, upon the point of limitation, contended that the appellant never obtained possession of the land or receipt of the profits or rent, and that the Statute of Limitations had therefore never commenced to run. The statute of 1897, s. 40, was identical with 3 & 4 Will. 4, c. 27, s. 28, which was in force at the date of the conveyance. The evidence shewed that the appellant never attempted to take possession or to exercise any act of ownership, although to protect the land from compulsory sale he paid the taxes; and accordingly the Act had no application. The respondent's omission to pay the taxes cannot be regarded as an abandonment of his right to redeem.

Counsel for the appellant were not heard in reply.

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The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This action was commenced on April 8, 1910, by a writ of summons in the Supreme Court of British Columbia, by the respondent, who is the plaintiff, against the appellant, the defendant. The action is for the redemption of certain land situated in the district of New Westminster. On January 26, 1911, Hunter C.J. dismissed the action with costs. On June 6 thereafter the Court of Appeal of British Columbia reversed that dismissal. The present appeal has accordingly been brought. The real and only point of the case is as to the

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(1) (1874) L. R. 5 P. C. 221, 229.

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application of the British Columbia Statute of Limitations, c. 123, R. S. B. C., 1897.

The facts are very simple. Before July, 1889, the appellant, Mr. Kirby, had lent to the respondent, Mr. Cowderoy, certain sums of money, and there can be no doubt that he offered security over certain small parcels or tracts of land in the district of New Westminster. This security took the shape of an absolute conveyance.

The date of the conveyance is July 1, 1889, and it is presumably in the ordinary form of indenture, with the usual clauses "to have and to hold unto the said grantee . . . . to and for his sole and only use for ever," with a covenant for quiet possession. Notwithstanding the form of this deed, it seems fairly clear, and to be established by letters passing between the parties, that the deed was meant to be a security only. In their Lordships' opinion, so far as the point in the present case is concerned, it is of no importance whether the deed be treated as an absolute conveyance or merely as a mortgage. By ss. 16 and 36 of the Statute of Limitation, an action by any person claiming any land or rent in equity for recovery of the same may be brought only within twenty years. By s. 40, when a mortgagee has obtained possession, "the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor . . . . in writing." It is admitted that the latter portion of this section does not apply, there being no written acknowledgment, and accordingly the whole question in this case is as to the running of the period of twenty years from the date of obtaining possession of the land. And this question does really not depend upon the reckoning of the lapse of time, but upon another, namely, whether in the circumstances of this case the appellant, Mr. Kirby, ever had possession under the deed of July, 1889.

Before dealing with that, it may be useful, however, to note that the deed appears to be one to which the British Columbia

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Statute, c. 23, of the Consolidated Acts, 1888, being an Act to facilitate the conveyance of real property, applies. Under s. 4 of that Act, " Every such deed, unless any exception be specially made therein, shall be held and construed to include . . . . the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor." By statute, accordingly, possession is yielded as part of the conveyance. In view of the facts just to be stated, it is not, however, in their Lordships' opinion, necessary to determine any point as to whether the " possession " so conveyed can be reckoned for the period of limitation in face of, say, occupation of the premises in an adverse sense by the grantor of the deed.

For the question in the present case seems to be largely determined by a consideration of what this property so conveyed was. The respondent affirms what was put to him, namely, that " it was simply wild land ; no one was in possession of it," and as to the period when the deed was granted, " it never had a value." The respondent's position in regard to the property was very simple. He had got his loan and had granted his conveyance. He came under a promise to pay interest periodically and compound interest and he never made any payment whatsoever. As to the property, he left it severely alone. The appellant, however, was not so fortunate. The property having been duly conveyed to him by the deed of July 1, 1889, he became liable as the owner thereof to pay the taxation upon it. Upon this subject the respondent is asked and answers as follows :

Q.—" You have never paid any of the taxes, have you, Mr. Cowderoy ? " A.—" No."

By the Court : " So that unless he [that is, the appellant, Mr. Kirby] had looked after the property himself his security would have disappeared, and been sold for taxes ? "

A.—" Well, I knew that he was always attending to it."

Q.—" How did you know that ? " A.—" Well, when I saw him sixteen years ago, he told me it was all right, and he was looking after everything."

It appears to be established, in short, that (1.) for over twenty years before the institution of this suit the appellant had, so far as this wild land was concerned, performed the only act of possession of which it appeared to be capable, namely, he had paid all the taxation upon it; whereas (2.) the respondent was aware that this was being done by the appellant, and he (the respondent), so far from having anything even remotely akin to adverse possession, had washed his hands of all connection with the property. In these circumstances, their Lordships are of opinion that the Statute of Limitation applies, and that it is not open to the respondent thereafter—when, as in the case here, the patch of land appears to have suddenly become of some marketable value—to bring this action to redeem.

On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate* v. *Lord Lovat* (1)—language cited with approval by Lord Macnaghten in *Johnson* v. *O'Neill* (2)—appears to be applicable to the present case. Possession "must be considered in every case with reference to the peculiar circumstances . . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession." There does not appear to their Lordships to be much doubt accordingly that possession of this land was, during the years in question, with the appellant, and no possession of any kind with the respondent.

Their Lordships are accordingly of opinion that the action is excluded by the Statute of Limitations. In this view it becomes unnecessary to consider other aspects of the case dealt with by the learned Chief Justice. They will humbly advise His Majesty that the appeal should be allowed, and the judgment of Hunter C.J., dismissing the action, should be restored, with the further costs incurred in both Courts since the date of that judgment. The respondent will also pay the costs of the appeal.

Solicitors for appellant: *Armitage, Chapple & Macnaghten.*
Solicitors for respondent: *Blake & Redden.*

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(1) 5 App. Cas. 288.

(2) [1911] A. C. 583.

[HOUSE OF LORDS.]

H. L. (E.)* 1912 May 10.

J. & E. KISH . . . . APPELLANTS;

AND

CHARLES TAYLOR, SONS & CO. . . . RESPONDENTS.

Shipping—Contract of Affreightment—Dead Freight—Lien—Unseaworthiness—Deviation—Port of Refuge—Necessity caused by Unseaworthiness.

A contract of affreightment is not put an end to either by a breach of the warranty of seaworthiness or by a deviation which is in fact necessary for the safety of the ship and crew but the necessity for which is caused by unseaworthiness.

The Europa [1908] P. 84, followed and approved.

Strang, Steel & Co. v. *Scott & Co.* (1889) 14 App. Cas. 601, explained and distinguished.

McLean v. *Fleming* (1871) L. R. 2 H. L. Sc. 128, establishes that dead freight includes unliquidated damages for the failure to load a full cargo.

The charterers of a ship having failed to load a full cargo as required by the charterparty, the master, to minimize the loss, procured a cargo from other sources and overloaded the deck to such an extent as to render the ship unseaworthy. In consequence of her unseaworthiness the ship was obliged to deviate from her course in order to put into a port of refuge for repairs, and, after repairing, she completed the voyage in safety. The shipowner was entitled under the charterparty, the conditions of which were incorporated in the bills of lading, to a lien on the cargo for dead freight:—

Held, that he was not debarred from asserting the lien against the cargo owners.

Decision of the Court of Appeal [1911] 1 K. B. 625, reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Walton J. (2)

The appellants were the owners of the steamship *Wearside*. By a charterparty dated December 18, 1907, the appellants chartered the steamship to the Mississippi Transportation Company to proceed to Mobile and Pensacola and there load a full and complete cargo of timber and to discharge at two ports on the Continent and one port on the west coast of the United Kingdom. The charterparty also fixed the rate of freight and provided that the master or owners were to have an absolute lien upon the cargo for all freight, dead freight, demurrage, or average.

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* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, and LORD ATKINSON. The EARL OF HALSBURY was present during the argument, but did not take part in the judgment.

(1) [1911] 1 K. B. 625.

(2) [1910] 2 K. B. 309.

The respondents were the holders of bills of lading for a portion of the timber shipped by the charterers. By the terms of the bill of lading the consignees were to pay freight for the goods at the rate therein specified, "all other conditions as per charterparty dated the 18th day of December, 1907, all the terms, provisions and exceptions contained in which charter are herewith incorporated and form part hereof."

The *Wearside* duly proceeded to Mobile and Pensacola, but when she was at Pensacola the charterers, after loading 801 standards, which was much less than a full cargo, became financially embarrassed and declared themselves unable to complete the loading in accordance with the obligations of the charterparty. Thereupon the master, in mitigation of the loss arising from the charterers' breach of contract in failing to load a full and complete cargo, procured other cargo amounting to 662 standards, whereof 331 standards were loaded in the holds of the ship and 331 on the decks thereof. The freight payable in respect of this additional cargo was considerably lower than the charterparty rate. The vessel, as Walton J. found, was capable of carrying 1390 standards.

On February 29, 1908, the *Wearside* left Pensacola on her voyage to Rotterdam and Dunkirk to discharge part of her cargo and thence to Liverpool to finish her discharge. In the course of her voyage, on March 14, the vessel met with heavy squalls which caused her to lurch to port, and, before she could recover herself, the deck cargo had shifted, carrying away the lashings and tearing up some of the deck plates, and, although part of the cargo was jettisoned, it became necessary for the safety of the vessel, her crew and cargo, to put into a port of refuge to restow the shifted cargo and to execute repairs. Accordingly the master put into Halifax, and having done what was necessary proceeded on his voyage. Upon the arrival of the vessel at Liverpool, where the respondents' goods were to be delivered, the appellants claimed to exercise their lien upon the cargo for the amount due for dead freight and demurrage, and the respondents, in consideration of the appellants delivering the cargo, undertook to pay to the appellants the amount, if any, for which it might be decided by a Court of competent jurisdiction in England the appellants were entitled to exercise their lien.

The cargo was duly delivered, and on May 12, 1908, the appellants commenced this action against the respondents. The appellants claimed (so far as is material to this appeal) a declaration that they were entitled to a lien on the respondents' goods for 1387*l.* for dead freight and payment of that sum. The main defence to the action was that the vessel, when she started on her voyage, was unseaworthy owing to her excessive deck load, that the deviation was rendered necessary by her unseaworthy condition, and that by reason of these facts the appellants failed to perform the contract contained in the charterparty and bills of lading and were not entitled to the benefit of any of the provisions contained therein respectively.

Walton J. found as a fact that the deck load on board the *Wearside* was excessive and rendered her unseaworthy at the time of sailing, but he held that the deviation, though rendered necessary by the ship's unseaworthiness, did not put an end to the contract of carriage and did not discharge the respondents from their liabilities under the bills of lading. He held further that a lien for dead freight covered a claim for unliquidated damages in respect of a loss suffered by the shipowner by reason of the failure to load a full cargo, and he gave judgment for the appellants (the plaintiffs) for 435*l.* odd. The respondents (the defendants) appealed against this judgment upon the question of liability, and there was a cross-appeal as to amount by the appellants (the plaintiffs), who claimed that they were entitled under their lien to a sum of 815*l.* odd.

The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) allowed the appeal on the ground that a deviation, the necessity for which was due to the ship being sent to sea in an unseaworthy condition, debarred the shipowner from asserting against the cargo owners the lien for dead freight

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conferred on him by the charterparty and the bills of lading, and as a consequence of this decision they dismissed the cross-appeal without argument.

1912. Feb. 8, 12. *Bailhache, K.C.*, and *Adair Roche* (*Spratt* with them), for the appellants. It is said by the respondents that the lien for dead freight conferred by the charterparty on the appellants has been destroyed (1.) by deviation, (2.) by unseaworthiness. The Court of Appeal have given judgment on the first point only. As to deviation, there was no deviation in fact, or, if there was, it was a justifiable deviation. The ship left port in an unseaworthy condition and was consequently compelled to jettison part of her cargo and put into a port of refuge. Was that a deviation of a kind which destroys the contract of carriage, at any rate from the point of deviation? The Court of Appeal have held that it destroyed the contract of carriage ab initio. It was not in fact a voluntary deviation; but even assuming that the deviation was unjustifiable, it cannot affect rights already accrued and therefore it cannot operate to deprive the appellants of their lien for dead freight, inasmuch as the right to a lien accrued when the charterers failed to supply a full cargo. In marine insurance cases it is settled that the policy is avoided only from the point of deviation, and there is no ground for saying that an unjustifiable deviation has any further retrospective operation in a charterparty case than in a marine insurance case. The Court of Appeal have proceeded on the view that the appellants cannot be heard to say that this deviation was involuntary, because it was due to their original breach of warranty, namely, the unseaworthiness of the ship, and they cannot take advantage of their own wrong. But the appellants are not taking advantage of their own wrong. That wrong imposed upon them an additional duty to repair, and they admit that they cannot claim from the property salved a general average contribution and that they must themselves bear the expense of putting into the port of deviation and of repairing; but in deviating to save life and property the master was performing a paramount duty, although that duty was involved by his own default. It is not open to the respondents, who are in the same position as the charterers, to assert that the appellants were taking advantage of their own wrong in doing their best to minimize the loss occasioned by the wrong of the charterers in not loading a full cargo. The appellants' contentions are stated by Walton J. in his judgment. This is at bottom an unseaworthiness case, and in that view of the case the deviation is immaterial. But in order to establish a claim on that head it must be proved that the unseaworthiness caused the damage. *Strang, Steel & Co.* v. *Scott & Co.* (1), upon which the Court of Appeal relied, was directed to a point which is not in dispute and would apply if the appellants were seeking from the cargo owners an indemnity in respect of the expense of putting into the port of refuge or of executing the repairs; but it is not an authority for the proposition that because a ship sailed unseaworthy and was bound to deviate the deviation can be set up against the shipowner as an additional wrong. As to the character of the deviation there is no authority directly in point. In *Guibert* v. *Readshaw* (2), which was an action on a policy, a new ship put into a port to repair because she had not enough ballast on board. It was therefore shewn that she was in fact unseaworthy. It was found that there was no deviation, but it was not suggested that the alleged deviation was wrongful on the ground of the unseaworthiness of the ship. In *Woolf* v. *Claggett* (3), which was also an action on a policy, Lord Eldon, no doubt, expressed an opinion adverse to the appellants' contention and thought that it was incumbent on a shipowner who sought to justify a deviation necessitated by the illness of the crew to shew that the ship was properly provided with medicines for the voyage; but it was not there proved that there was in fact any necessity for the deviation. In *Weir* v. *Aberdeen* (4), where a ship sailed in an unseaworthy state owing to overloading and was compelled to put back to discharge some of her cargo, and a loss subsequently accrued which was in no way attributable to the overloading, the underwriters were held liable, but that case was complicated by the question how far the underwriters had assented to the deviation. *Forshaw* v. *Chabert* (1) was dealt with as a case of unseaworthiness, the ship having sailed without her full complement of men. *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (2) was a clear case of deviation to repair unseaworthiness, but there was no suggestion that the deviation was therefore unjustifiable and the decision was founded on unseaworthiness. Deviation is dealt with by the Marine Insurance Act, 1906, ss. 46, 49. The appellants come within clauses (*d*) and (*e*) of s. 49. As a matter of principle a shipowner or master cannot be fairly said to be taking advantage of his own wrong if he deviates to repair a defect caused by his own default. The decision of the Court of Appeal was founded upon a misapprehension of *Strang, Steel & Co.* v. *Scott & Co.* (3). Then as to retrospective operation of the deviation, in marine insurance cases there is an implied warranty of seaworthiness, and if the ship sails unseaworthy the insurer is never at risk, but in the case of deviation the risk ceases from the point of deviation; there is no relation back to the commencement of the voyage. In *Balian* v. *Joly, Victoria & Co.* (4) it was decided that a deviation deprived the shipowner of the benefit of all exceptions in the bill of lading. Lord Esher, however, thought that the lien for freight would remain. That case was followed in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (5) There Collins M.R. suggested that deviation should stand on the same footing as unseaworthiness, and he drew an analogy between unseaworthiness in a policy of marine insurance and deviation in a contract of affreightment. It is submitted that that is a false analogy. In *Internationale Guano en Superphosphaatwerken* v. *Robert Macandrew & Co.* (6) Pickford J. considered himself bound by *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (5) In *The Dunbeth* (7), on the contrary, the law is stated by Gorell Barnes J. in quite different terms, and in every case, as a matter

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(1) 14 App. Cas. 601.

(2) (1781) (before Lord Mansfield and a jury), reported in Park on Marine Insurances, 8th ed., vol. 2, p. 637.

(3) (1800) 3 Esp. 257.

(4) (1819) 2 B. & Al. 320.

(1) (1821) 3 Br. & B. 158.
(2) (1870) L. R. 3 P. C. 234.
(3) 14 App. Cas. 601.
(4) (1890) 6 Times L. R. 345.
(5) [1907] 1 K. B. 660.
(6) [1909] 2 K. B. 360.
(7) [1897] P. 133.

of fact, the damage has been subsequent to the deviation. Then as to the effect of unseaworthiness, does it destroy the contract of affreightment or does it merely give a right of action in respect of the damage caused by the unseaworthiness? The authorities shew that the latter is the true view: *The Europa* (1); *Schloss* v. *Heriot* (2); *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.* (3); *Kopitoff* v. *Wilson* (4); *Steel* v. *State Line Steamship Co.* (5)

Atkin, K.C., and *Holman Gregory, K.C.*, for the respondents. Deviation puts an end to the special contract of affreightment and the onus is on the shipowner to justify the deviation. There is the same implied warranty in a contract of affreightment as in marine insurance. The one element which forced this ship to go to a port of refuge was her unseaworthiness, and the sole question is, can the shipowner rely on a necessity caused by his own default—a self-created necessity? It is submitted that he must shew that the necessity arose without his default. Direct authority on the point there is none, but the principle is that a man may not take advantage of his own wrong. The cases on general average are analogous. *Strang, Steel & Co.* v. *Scott & Co.* (6) is not limited to claiming recompense for services rendered or indemnity for loss. It cannot be said that it is within the contract of affreightment that a shipowner should deviate when the only occasion for the deviation has arisen from his preliminary breach of contract. In this respect there is no reason for distinguishing between general average purposes and charterparty purposes; the two things stand on the same principle.

[EARL OF HALSBURY referred to *Dakin* v. *Oxley*. (7)]

That case does not meet the primary obligation of the shipowner to sail direct, subject to his right to deviate justifiably. A breach of the contract to carry skilfully does not displace the contract of affreightment, but a deviation, unless justified, does. The former only gives rise to a cross-action. *Woolf* v. *Claggett* (8) shews that a deviation the necessity for which is caused by the default of the shipowner in not providing a seaworthy ship is not justified, and the same law was applied in Massachusetts: *Kettell* v. *Wiggin*. (1) It is said that a deviation only avoids the contract from the point of deviation and that the appellants' right to a lien had accrued at the commencement of the voyage; but, first, deviation displaces the contract ab initio, and, secondly, even if it does not, the lien would still be lost. The right to a lien can only be exercised if the goods are brought to their destination on the contract voyage, and that has not been done by reason of the deviation. The appellants had a right to recover the deficiency arising from the failure of the charterers to furnish a full cargo, but the lien is only a right to hold the goods as security for that deficiency at the end of the voyage. In *Balian* v. *Joly, Victoria & Co.* (2) and *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (3) the contractual right was in existence at the time of the deviation, but it could only be enforced at the end of the voyage. As to unseaworthiness, the warranty of seaworthiness is the same in a contract of affreightment as in a contract of insurance, and unseaworthiness similarly puts an end to the contract. The law as to the implied warranty of seaworthiness is now expressed in the Marine Insurance Act, 1906, ss. 33, 34, 39. The legal consequences of the breach of that implied warranty are quite independent of the question whether the damage is caused by the unseaworthiness. In *Lyon* v. *Mells* (4) Lord Ellenborough, in reference to a contract of affreightment, speaks of the implied warranty of seaworthiness as the very foundation and immediate substratum of the contract. It is suggested that this is not a condition, but merely a collateral term, and that the only remedy is in damages; but if a shipper discovers before loading that the ship is unseaworthy he can refuse to perform his contract: *Stanton* v. *Richardson*. (5) That case must have been decided on the footing that it was an essential condition of the contract that the ship should be seaworthy. The only authority to the contrary is *The Europa* (6), and that has not met with universal

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(1) [1908] P. 84.

(2) (1863) 14 C. B. (N.S.) 59.

(3) [1892] 1 Q. B. 253, at pp. 257, 258.

(4) (1876) 1 Q. B. D. 377.

(5) (1877) 3 App. Cas. 72, at p. 88.

(6) 14 App. Cas. 601.

(7) (1864) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 115.

(8) 3 Esp. 257.

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(1) (1816) 13 Mass. 68.

(2) 6 Times L. R. 345.

(3) [1907] 1 K. B. 660.

(4) (1804) 5 East, 428, at p. 437.

(5) (1874) L. R. 9 C. P. 390.

(6) [1908] P. 84.

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approval. It is difficult to reconcile that authority with the cases as to the non-application of the exceptions in the contract to an unseaworthy ship. *Schloss* v. *Heriot* (1) was not an action on a contract of affreightment, but was an action to recover a contribution on a general average loss, and it is only an authority for the proposition that on a claim of general average contribution as between owners of cargo, unseaworthiness is not a good plea. Further, a clause giving a lien for dead freight does not apply to unliquidated damages for breach of a contract to supply a full cargo: *Gray* v. *Carr.* (2) *McLean* v. *Fleming* (3) is said to be opposed to this view, but in that case the action was against the charterers themselves and the claim was really a claim for liquidated damages, and it was distinguished on that ground by the majority of the Court in *Gray* v. *Carr.* (2) The dicta of Lord Chelmsford were not necessary to the decision of the case.

[EARL LOREBURN L.C. *McLean* v. *Fleming* (3) has been generally recognized as deciding that dead freight included unliquidated damages for the failure to load a full cargo.]

[They contended further that, having regard to the special terms of the charterparty, the clause conferring a lien for dead freight was not incorporated in the bill of lading and relied on *Gardner* v. *Trechmann.* (4) The respondents' argument on this point is fully dealt with in the judgment of Lord Atkinson.]

Bailhache, K.C., in reply, referred to *Gray* v. *Carr* (2) and *Porteus* v. *Watney* (5) on the question whether the clause in the charterparty conferring a lien for dead freight was incorporated in the bill of lading.

The House took time for consideration.

May 10. LORD ATKINSON. My Lords, in this case the appellants, the owners of the ship *Wearside*, claim a lien upon the goods of the respondents, the indorsees of a bill of lading, dated January 23, 1908, which purported to incorporate all the conditions, provisions, and exceptions contained in a certain charterparty dated December 18, 1907, made between these owners and the Mississippi Transportation Company of Gulfort, Miss.

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(1) 14 C. B. (N.S.) 59.
(2) (1871) L. R. 6 Q. B. 522.
(3) L. R. 2 H. L. Sc. 128.
(4) (1884) 15 Q. B. D. 154.
(5) (1878) 3 Q. B. D. 534, at pp. 541, 542.

By this charterparty the *Wearside* was bound to proceed to Mobile and there or at Pensacola load a full and complete cargo of timber of the kind described, and being so loaded to proceed to a port on the Continent between Bordeaux and Hamburg (Rouen excluded) and, at charterers' option, to discharge at two ports on the Continent and one port in the United Kingdom. The port of Liverpool was ultimately selected as the port of discharge in the United Kingdom. The charterparty contained the following clauses amongst others: (1.) a clause authorizing the *Wearside* to deviate for the purpose of saving life and property; (2.) a clause to the effect that the master or owners of the ship were to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and (3.) a clause that any difference between charterparty and bills of lading was to be settled at the port of loading before the vessel sailed; if in favour of vessel to be paid in cash at current rates of exchange less insurance; if in the charterers' favour by captain's bills payable ten days after arrival at port of discharge.

The vessel duly arrived at Mobile and subsequently went to Pensacola to load. The charterers were admittedly under this charterparty absolutely bound to furnish a full cargo. They failed to do this. They only shipped 801¼ standards, all of which were properly stowed in the hold of the vessel. Fully loaded she would have carried 1390½ standards; the cargo shipped was therefore short by 589¼ standards. Now it is not suggested that at the time the charterers thus broke their contract the vessel was not perfectly seaworthy, was not fit in every way to receive her full cargo, or that her owners had, up to that time, failed in any respect to carry out, or were not ready and willing fully to carry out, their contract. There was therefore nothing to justify or excuse this breach of contract by the charterers, and the right to recover damages for the breach had accordingly accrued to the owners. These damages are what is styled dead freight. In Carver's Carriage by Sea, par. 666, dead freight is defined to be the compensation payable to the shipowner when the charterer has failed to ship a full cargo. Freight is the recompense which the shipowner is to receive for carrying the cargo to its port of discharge. The two things are wholly dissimilar in their nature, though, of course, the freight the shipowner would have earned if the charterers had fulfilled their contract will in most cases be a fair measure of the damages which he is entitled to recover. And it is in my view clear from the decision of your Lordships' House in *McLean* v. *Fleming* (1) that an agreed lien does cover such damages though they be unliquidated. Walton J. states in his judgment that it was not disputed before him that the words occurring in the bill of lading "all other conditions as per charter" import into that document the provision of the charterparty giving to the owners of the vessel an absolute lien on the cargo for dead freight amongst other things. Indeed, in the face of the authorities this could not be disputed successfully. They are, I think, clear upon the point. So that before ever the vessel had loaded more than the 801 standards the right to recover this compensation had accrued to her owners, and they had become entitled to a lien on the cargo in respect of them. The master of the vessel, after the default of the charterers, and in their relief, obtained additional cargo from other sources. Unfortunately, he overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and, by reason of her overloaded condition, her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portions damaged, and the vessel herself was so damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo restowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss they have sustained, and do not claim from any one concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship. They do not seek in any way to take, in this respect, any advantage of their own wrong in the proper sense of that expression.

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(1) L. R. 2 H. L. Sc. 128.

The *Wearside* duly arrived at Liverpool. The respondents' portion of the cargo was uninjured, and the ship was ready to deliver it. The respondents, however, dispute the existence of the shipowners' lien for dead freight to any amount mainly on two distinct grounds. First, they contend that, as every shipowner is held to warrant the seaworthiness of his ship, the breach of that warranty puts an end to the contract of affreightment contained in the bill of lading, which becomes, they say, void ab initio, and consequently that, though the goods in specie have been duly carried to their destination undamaged, the indorsees of the bill of lading are only obliged to pay the shipowners for their service such sum as they may be entitled to as common carriers by sea instead of the remuneration stipulated for in the bill of lading.

Second, they contend that the deviation to the port of Halifax was unjustifiable in this respect, that however necessary it may have been in order to save the ship and cargo and the lives of her crew owing to the perilous condition to which the vessel was in fact reduced, yet, as that condition was in part due to the act of the master in overloading her with deck cargo to such an extent as to make her unseaworthy, the deviation must be treated as a deviation made without any necessity whatever, a gratuitous alteration of the voyage rendering the contract of affreightment contained in the bill of lading void ab initio. Of the several points raised by the respondents in the Court of Appeal this latter was the only one decided. The Lords Justices held that the respondents' contention was right, that the deviation constituted a new voyage different from that with which the bill of lading and charterparty were conversant, and that the former of these documents, if not both, were, therefore, void ab initio.

Mr. Atkin, on behalf of the respondents, was driven to admit that, if his contention on the first point were sound, it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed port of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of the master which have been held to render a vessel unseaworthy, such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew, he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and not having been performed the contract of affreightment was entirely displaced.

No authorities were cited in support of this proposition. I think it is in conflict with the principles of English law.

In *Dakin* v. *Oxley* (1) Willes J. deals exhaustively with the question whether, under the laws of different continental and other foreign countries, the indorsee of a bill of lading is relieved from his contract where the cargo arrives at the port of lading in specie, though damaged through the negligent navigation of the ship by her master and crew. And as to the law of England on this point, at p. 119 of the *Law Journal* report he speaks thus: "The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged condition when they arrive." Freight must be paid even where the damage is culpable, and the parties must be left to a cross-action.

The case of *The Europa* (2) is, I think, an authority against the respondents' contention. There the action was brought by the charterer against the shipowner in respect of goods damaged by one of the perils of the sea excepted by the charterparty, not by the unseaworthiness of the ship, which was admitted. It was held by Bucknill and Bargrave Deane JJ., on a line of reasoning which appears to me convincing, that the charterparty, notwithstanding this unseaworthiness, was not displaced, that, on the contrary, the clause excepting perils of the sea was alive and operative, and that the shipowner, despite his breach of warranty, was protected under it from liability for the injury done to the goods.

Neither in *Steel* v. *State Line Steamship Co.* (3) nor in *Gilroy, Son & Co.* v. *Price & Co.* (4) was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment and relegated the shipowner to his rights as a common carrier by sea. On the contrary, the observations of Lord Blackburn in the former case, printed at pp. 88 and 91 of the report, seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage. At p. 88 he used these words: "So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though itself a peril of the seas which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it"; and at p. 91 he says: "I have no doubt what the result will be; it will be a question, taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit," which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment, so far as it dealt with that liability.

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(1) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 115.

(2) [1908] P. 84.

(3) 3 App. Cas. 72.

(4) [1893] A. C. 56.

In *Baumwoll Manufactur von Scheibler* v. *Gilchrest & Co.* (1) Lord Esher is reported to have used these words: "The first cause of action that they allege is for breach of bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but it must also be shewn that the unseaworthiness was the cause of loss." The fact that a ship is not in a fit condition to receive her cargo, or is from any cause unseaworthy when about to start on her voyage, will justify the charterer or holder of the bill of lading in repudiating his contract and refusing to be bound by it, and, of course, the parties can, by mutual consent, rescind their contract of affreightment; but repudiation and rescission are questions of fact. They have not been found by the judge at the trial in this case.

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(1) [1892] 1 Q. B. 253, at p. 257.

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It lay upon the respondents to procure findings upon them if they wished to escape on these grounds from the obligations of their contract.

Having regard, therefore, to the authorities I have cited and the absence of all authority to support the respondents' contention on their first point, it is, I think, unsound and unsustainable according to the law of this country.

On the second point it is not disputed that it is prima facie not only the right but the duty of the master of a ship to deviate from the course of his voyage and seek a harbour or place of safety, if that be reasonably necessary in order to save his ship and the lives of his crew from the perils which beset them. Neither is it disputed by the appellants that they are answerable in damages to every person who sustains loss or injury by reason of the breach of their warranty of the seaworthiness of their ship, and they further admit that they cannot require the owners of the cargo or any portion of it to recoup them to any extent for any loss they may have sustained or expense to which they may have been put as a result of this breach of warranty, or of any course they may have had to take in consequence of it. That voluntary or unwarranted deviation may render the contract of affreightment void ab initio was decided by the Court of Appeal in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) What the appellants contend is, in effect, this, that justifiable deviation does not avoid the contract; that, to use the language of Lord Watson in a case to be presently referred to, "it is the presence of the peril and not its causes" which justify it, and that it is, therefore, immaterial whether the unseaworthiness of the ship or her negligent navigation contributed directly to the peril or not. Judged by that test it is not disputed that the deviation in the present case was justifiable, and, if so, that the contract of affreightment was not void ab initio. So that the question for decision resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives.

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(1) [1907] 1 K. B. 660, 668.

The Court of Appeal appear to have considered that they found in Lord Watson's judgment in *Strang, Steel & Co.* v. *Scott & Co.* (1) a principle which was applicable to the present case. They did not refer to any other authority in support of their decision on this point. With the utmost respect I am quite unable to concur with them. In that case, through the negligence of the master, the ship was driven ashore and part of her cargo was jettisoned.

The question with which Lord Watson was dealing in the passage cited from his judgment by Fletcher Moulton L.J. was what he styled the first question raised in the case, namely, "whether innocent owners of cargo, sacrificed for the common good, are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the shipmaster's fault": see p. 605. At p. 606 he says: "Each owner of jettisoned cargo becomes a creditor of the ship and cargo saved, and has a direct claim against each of the owners of the ship and cargo for a pro rata contribution towards his indemnity, which he can enforce by a direct action." At p. 609 he states: "The Rhodian Law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence." And just immediately before the passage cited on p. 608 he says, "The principle upon which contribution becomes due does not appear to them" (their Lordships) "to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected, whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved. There are two well established exceptions to the rule of contribution for general average which it is necessary to notice."

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(1) 14 App. Cas. 601, at p. 608.

He then proceeds to deal with the first exception in the passage cited. Lower down on the same page, 608, he deals with the second exception, deck cargo; at p. 609 he says: "But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck." And after stating that such exceptions as are recognized in *Schloss* v. *Heriot* (1) are in truth limitations of the rule introduced, from equitable considerations, in the case of actual wrong-doers, on the following page he states the conclusion of the Judicial Committee thus: "The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

To permit a wrong-doer to recover contribution in such a case would indeed be to permit him to take advantage of his own wrong, for his wrong-doing necessitated the sacrifice out of which his claim for contribution would spring. The present case is wholly different. Here the claim of the appellants arose before they were in default at all. It does not spring from their default; it is entirely independent of their default. It springs, on the contrary, from the respondents' default. And the contract of the parties provides a specific and particular method, a lien, by which it may be enforced. It is, in truth, the respondents, not the appellants, who seek to take advantage of the appellants' wrong in order to deprive the appellants of a right which the respondents' wrong gave to them. This distinction between the case of *Strang, Steel & Co.* v. *Scott & Co.* (2) and the present case is, to my mind, crucial, and prevents the decision in

(1) 14 C. B. (N.S.) 59.

(2) 14 App. Cas. 601.

that case from being any help whatever to the proper decision of the present.

On the whole, therefore, I am of opinion that a master, whose ship is, from whatever cause, in a perilous position, does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to recover damages from all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation, nor are the rights of the owners under it lost.

And, speaking for myself, I may say that I think it would not be consistent with any principle of justice that these rights should be lost. The fact that by a policy of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is therefore his right not to have these risks increased, differentiates, I think, altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brought safely and undamaged to the port of discharge. The respondents' contention on the second point is in my mind, therefore, as unsustainable as that on the first.

The respondents' contention on their third point amounts, as I understand it, to this. The freight mentioned in the bill of lading is, they say, 26*s*. per load of 50 cubic feet. *Gardner* v. *Trechmann* (1) decides that, where the freight mentioned in the charterparty is more than that mentioned in the bill of lading, the indorsee of the latter, claiming as such, is, in the absence of special agreement to the contrary, only bound to pay the lesser freight. Here there is a special agreement, in the last clause of the charterparty, providing that any difference between the two should be settled at the port of lading before the vessel sails.

Therefore, as dead freight is still freight, it should either not be paid at all, as it is not included in the freight mentioned in the bill of lading, or if payable at all it should, under the last clause of the charterparty, have been settled and paid at the period of loading before the vessel sailed at all. The answer to this ingenious but very fallacious argument is that dead freight is not

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(1) 15 Q. B. D. 154.

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freight at all properly so called, but is in reality damages for breach of contract, for convenience nicknamed dead freight, and that neither the last clause in the charterparty nor the case of *Gardner* v. *Trechmann* (1) has any application whatever to it.

On the whole, therefore, I am of opinion that on the three points argued before your Lordships the respondents fail, and that the appeal ought to be allowed with costs, and, further, that the case should be remitted to the Court of Appeal to deal with the award of damages by Walton J., against which both parties have appealed.

Lord Macnaghten. My Lords, I have had the advantage of reading in print and considering the judgment which has just been delivered by my noble and learned friend Lord Atkinson, and I entirely agree.

Earl Loreburn L.C. My Lords, I also agree.

Order of the Court of Appeal reversed, the respondents to pay the costs of the appeal. Cause remitted back to the Court of Appeal to deal with the question of the amount adjudged due to the appellants by the judgment of Walton J. and with the appeal of the respondents and the cross-appeal of the appellants as to the amount so adjudged. The costs in the Courts below to be reserved to be dealt with by the Court of Appeal.

Lords' Journals, May 10, 1912.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Trinder, Capron & Co.*

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(1) 15 Q. B. D. 154.

Considered. HOFFMAN *v.* FINEBERG.
[1948] 1 All E.R. 592.

[HOUSE OF LORDS.]

HYMAN AND ANOTHER . . . . APPELLANTS ; H. L. (E.)

AND 1912

ROSE . . . . RESPONDENT. *May* 14 ; *July* 26.

Landlord and Tenant—Repairing Covenant—Breach—Waste—Relief against Forfeiture—Terms of Relief—Conversion of Chapel into Theatre—Structural Alterations—Reinstatement—Conveyancing Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14, *sub-ss.* 1, 2, 3.

A piece of ground and the chapel then erecting thereon were demised for a term of ninety-nine years less ten days from Christmas, 1842, and the lease contained covenants by the lessees to complete the chapel by a given date and to repair, maintain, and keep the chapel and the walls, fences, and other appurtenances thereto belonging in good and substantial repair. The chapel was completed and was separated from the adjoining street by some iron railings, but it did not appear when these railings were erected. It was used as a place of religious worship for sixty years. The lease was then sold with the consent of the Charity Commissioners and the premises were adapted for a cinematograph theatre. For this purpose the purchasers removed the iron railings, opened a new door in the west wall of the building, and made various alterations in the interior. The vendor had neglected to comply with a notice to repair and the reversioner was entitled to possession under a proviso for re-entry for breach of covenant, subject to a claim by the purchasers for relief against forfeiture. The purchasers offered, as the conditions of obtaining relief, to deposit a sum of money to secure the restoration of the premises to their original condition at the end of the lease, and also to erect and maintain a movable fence of posts and chains in the line of the old fence in order to exclude the public from the premises:—

Held that, in view of the fact that the lease did not prohibit the contemplated user of the premises, none of the alterations, in the circumstances, constituted either a breach of covenant or waste, and that relief ought to be granted on the terms proposed.

Decision of the Court of Appeal [1911] 2 K. B. 234, reversed.

APPEAL from an order of the Court of Appeal. (1)

The appellants, Hyman and Rosenthal, were the assignees of

* *Present:* EARL LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE. LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

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(1) [1911] 2 K. B. 234.

an underlease of certain premises in Bethnal Green for a term of ninety-nine years less ten days from December 25, 1842. The reversion expectant on the determination of the underlease was vested in the respondent, Mrs. Rose, who in the events which happened was entitled to possession of the demised premises under a proviso for re-entry upon the breach of any of the covenants contained in the underlease, subject to a claim by the appellants under the Conveyancing Act, 1881, for relief against forfeiture. The question raised by this appeal was as to the terms upon which that relief should be granted.

By an indenture of lease dated May 28, 1845 (being the underlease in question), made between Mary Ann Marishall, widow, of the one part, and several persons, thereinafter called "the said lessees," of the other part, after reciting that by an agreement dated December 24, 1844, John Ditchman agreed to demise to the said lessees the piece of ground by the now stating indenture more particularly described and intended to be thereby demised from December 25, 1842, for the term of ninety-nine years wanting ten days at the yearly rent of 33*l.*, and that the said lessees thereby agreed on or before June 24, 1846, to expend 2000*l.* at the least in erecting upon the said piece of ground "a chapel or place for religious worship with its appropriate offices with all party and other walls and that such chapel offices and party walls should be built in every respect in conformity with the plans and specifications therein particularly mentioned and signed by the said parties and with proper footpaths in the front and at the sides thereof next the street," and that the said John Ditchman further agreed that when the said chapel should be built up and covered in he would grant a good and sufficient lease of the said piece of ground and buildings thereon erected "with the yards and other conveniences and appurtenances attached or belonging thereto" to the said lessees or their nominees for the term aforesaid, and reciting that by an indenture dated March 19, 1845, the said John Ditchman assigned to the said Mary Ann Marishall the said piece of ground with the chapel erecting and building thereon for the residue of the term under which he held the same, subject nevertheless to the above recited agreement, a certain piece of ground situate at the corner of Hackney Road and St. Peter's Street, Bethnal Green, "together with the chapel or place of public religious worship with its offices and premises now erecting and building thereon by the said lessees," and all rights, easements, and appurtenances thereto belonging were demised at the rent and for the term above mentioned. The lease contained covenants by the lessees that they would on or before June 24, 1846, complete and make ready for public worship the "said chapel or place of public religious worship with its appropriate offices and all appurtenances thereto belonging"; "And also shall and will from time to time and as often as occasion shall require during the said term well and substantially repair support uphold maintain pave . . . . amend and keep the said demised chapel offices buildings and premises and all the walls fences pavements . . . . and all other appurtenances thereto belonging in good substantial and tenantable repair . . . . And also shall not nor will at any time during the said term alter or vary the front elevation of the said demised chapel offices buildings and premises" without the consent of the lessor. Then followed a covenant to yield up to the lessor at the end of the term the premises with the appurtenances so repaired, supported, upheld, maintained, paved, amended, and kept as aforesaid, with all landlord's fixtures and all improvements. The lease also contained covenants not to carry on or permit or suffer to be carried on, in, or upon the said ground, chapel, offices, buildings, or any part of the demised premises certain specified trades (being trades of an offensive nature not material for the purposes of the present appeal), not to permit the premises to be converted into a national school or public Sunday school, charity school or parochial school, and not to permit or suffer to be carried on thereon any noxious, noisome, or offensive trade, business, or occupation whatsoever, or that might be or grow to be a nuisance to the occupiers of adjoining premises, without the previous consent in writing of the lessor and of the superior landlord; and the lease contained a proviso for re-entry upon breach of any of the lessees' covenants.

The chapel was completed and the premises were separated from the adjoining streets by a dwarf stone wall surmounted by ornamental iron railings, which surrounded the property on the north and west sides, and enclosed a space about twelve feet wide between the chapel and the public footway. It did not appear from the evidence when the dwarf wall and railings were erected. The chapel, which was known as Adelphi Chapel, was used under the terms of a trust deed as a place of religious worship until about the end of 1909; it had since been unused and had fallen into disrepair.

In the spring of 1910 the lease of May 28, 1845, was vested in James Spicer, who was the sole surviving trustee of the premises, and the reversion expectant on the determination of the lease became vested in the respondent. Spicer having committed breaches of the repairing covenant contained in the lease, on July 22, 1910, the respondent caused a notice to be served on the premises specifying the breaches of covenant and requiring the lessee to remedy the said breaches and make compensation. Spicer, however, failed to comply with this notice.

On November 12, 1910, the respondent commenced an action against Spicer (*Rose* v. *Spicer* [1910 R. 1653]) to recover possession of the premises.

In the meantime, namely, in April, 1910, Spicer had agreed, subject to the consent of the Charity Commissioners, to sell the premises for the residue of the term to Edith Falander and Edward M. Montefiore, who in turn agreed, subject to the like consent, to sell the premises to H. T. Underwood. In May, 1910, Underwood sold the benefit of the last-mentioned agreement to the appellants, who proposed to use the premises as a cinematograph theatre.

On August 11, 1910, an order was made by the Charity Commissioners, on the application of Spicer, vesting the demised premises in the London Congregational Union for the residue of the term, and by a further order of the Charity Commissioners the union, as trustees of the charity, were authorized to sell the premises. By an indenture dated November 30, 1910, the London Congregational Union, as trustees and at the request of Spicer, assigned the premises for the residue of the term to E. M. Montefiore and Edith Falander, and by an indenture dated December 1, 1910, the premises were assigned to the appellants as tenants in common.

The appellants immediately entered into possession and proceeded to put the premises in thorough repair and to make the structural alterations necessary to adapt the premises for use as a cinematograph theatre. They removed the dwarf wall and railings above mentioned; they cut the west wall of the chapel for the purpose of making a new doorway into the street, and also a window, and they cut the east wall for the purpose of enlarging an existing doorway; they removed two wooden staircases from the north end of the interior of the chapel and in lieu thereof constructed two new fireproof staircases at the south end, and for this purpose they removed a portion of a wooden gallery in the interior; they removed the organ and blocked up the organ chamber with a plaster screen; they erected a lantern loft at the north end of the building, and took out one panel of the ceiling and reconstructed it on a slope; they removed the existing water closets and constructed new water closets near a vestibule which had been formed inside the main entrance; they also raised the level of the floor along the gangways between the seats.

On January 24, 1911, while these works were in the course of construction, the respondent commenced an action against the appellants (*Rose* v. *Hyman and Rosenthal* [1911 R. 119]) claiming (1.) damages for injury to her reversion; (2.) possession; (3.) an injunction.

On February 4 Horridge J. granted an interlocutory injunction in this action restraining the defendants from altering the character of the chapel or its offices.

On February 10 the appellants obtained ex parte an order from a Master giving them leave to appear in the action of *Rose* v. *Spicer* and defend the same, and they immediately entered an appearance thereto.

On the same February 10 they took out summonses in both actions asking that they and Spicer might be relieved from forfeiture of the lease and for consolidation of the two actions.

On February 14 the respondent took out a summons in the action of *Rose* v. *Spicer* asking that the appearance of the appellants in that action might be struck out.

On February 15 both these matters came before the Master. The Master refused the respondent's application to strike out the appearance of the appellants in the action of *Rose* v. *Spicer*, and he also refused the appellants' applications for relief, but without prejudice to any application for relief to the judge who tried the action, and for the trial of both actions together by the same judge.

Both parties appealed against these orders to Ridley J., the judge in chambers.

On March 2 Ridley J. made an order in each action refusing to grant to the appellants relief against forfeiture, and he also made a further order in the action of *Rose* v. *Spicer* striking out the appearance of the appellants in that action.

The appellants appealed to the Court of Appeal against the order of Horridge J. of February 4, 1911, and against the three orders of Ridley J. of March 2, but upon these appeals it was agreed that the only question to be decided should be whether the appellants were entitled to relief from forfeiture of the lease and the terms upon which such relief should be granted.

Upon the hearing of these appeals the appellants offered as the terms on which relief should be granted to deposit a sum sufficient to ensure the restoration of the premises to their former condition at the end of the term, to pave to the satisfaction of the lessor's architect the ground enclosed by the former fence in such a way as to distinguish it from the public footway, and to supply and from time to time erect in the line of the old fence, to the like satisfaction, a movable fence, consisting of uprights resting in sockets in the ground and connected by chains or bars.

The Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton L.J., Buckley L.J. dissenting) held that the alterations complained of were breaches of the covenant to repair and were acts of waste which the Court would restrain by injunction, and that relief ought not to be granted except upon the terms of the reinstatement of the premises in their former condition.

1912. March 1, 4. *Buckmaster, K.C.*, and *Disturnal*, for the appellants. A lessee may make such use of the demised premises as he pleases subject to the express prohibitions in the covenants contained in the lease. Where a contemplated user of the

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premises is not prohibited by the terms of the lease and alterations are made to fit the premises for that user, the immediate restoration of the premises cannot be insisted upon as a condition of relieving against forfeiture in a case where the lessee offers to deposit a sum of money to secure the restoration of the premises to their original condition on the expiry or sooner determination of the lease. Sect. 14 of the Conveyancing Act, 1881, contemplates that there may be breaches of covenant which are irremediable and yet that relief may be given. It negatives the possibility of any rule that the remedy of a breach is a condition precedent to the granting of relief. No such condition is imposed by the statute. If any breach of the repairing covenant has been committed by the appellants it is a technical and not a substantial breach and one that does not affect the lessor's reversion. Alterations compatible with any permitted user of the premises may be made by the lessee provided they do not substantially affect the structure: *Doe* v. *Jones* (1), where the conversion of a private house into a shop was held not to be a breach of a covenant to repair. The main difficulty in this case is as to the removal of the fence; but the lease contains no covenant to repair this particular fence, and there is no evidence to shew that it was in existence at the date of the lease. The object of the fence was to exclude the public from the premises, and if the same object is attained by other means no harm is done to the reversion. The only reference to fences in the lease is contained in the general words of the covenant to repair. In the particular circumstances of this case the conditions which the appellants offer are abundantly sufficient to protect the lessor. [They also referred to *Doherty* v. *Allman*. (2)]

P. O. Lawrence, K.C., and *G. Herbert Higgins*, for the respondent. No Court has a right to estimate the value of any particular covenant when it comes to a question of forfeiture. The lease has been forfeited as against Spicer, and the appellants are mere trespassers with full notice of the lessor's position. The question is whether, where a breach is committed and is capable of being remedied, the Court will permit a continuance of the breach merely because it is said that the lessor cannot prove

(1) (1832) 4 B. & Ad. 126.

(2) (1878) 3 App. Cas. 709.

damage. The respondent relies upon the demolition of the boundary fence and wall, the opening of the door in the external wall of the chapel, and the substantial alteration of the interior as constituting breaches of the repairing covenant and waste. If the respondent had applied to the Court while the fence was being destroyed, she must have got an injunction, but it is said, now that the mischief is done, that this breach of covenant is to be condoned. To grant relief in such a case without insisting upon the restoration of the fence is to sanction a variation of the contract in a matter which is capable of being remedied. That is contrary to the intention of the Legislature: *Batson* v. *School Board for London.* (1) It was not intended to give authority to the Court to grant a licence to the lessee to commit a continuing breach in cases where it does not think the matter important. The appellants are seeking to purchase a release of an express covenant. *Doe* v. *Jones* (2) is distinguishable because in that case there was no covenant to maintain and uphold. The fence which has been demolished was a substantial boundary fence, and the fair inference is that it was included in the original plans of the chapel, but, whether that be so or not, it is within the covenant. Further, the opening of a door in a wall is a breach of a covenant to maintain the wall: *Gange* v. *Lockwood* (3); *Doe* v. *Jackson.* (4) *Doherty* v. *Allman* (5) does not apply, for in that case there was no power of re-entry on breach of covenant.

Buckmaster, K.C., in reply.

The House took time for consideration.

May 14. EARL LOREBURN L.C. My Lords, the question in this case is upon what terms, if at all, relief should be given against forfeiture for breaches of covenant in a lease of Adelphi Chapel, under s. 14, sub-s. 2, of the Conveyancing Act, 1881. When that is decided the decision will have to be applied to the orders made by the Court of Appeal and by the several judges and Masters before whom this intricate piece of litigation has been discussed at different stages.

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(1) (1904) 69 J. P. 9.

(2) 4 B. & Ad. 126.

(3) (1860) 2 F. & F. 115.

(4) (1817) 2 Stark. 293.

(5) 3 App. Cas. 709.

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I desire in the first instance to point out that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand.

In this particular case there have been breaches of covenant as to which there is no doubt that they must be remedied as a condition of relief, but the real dispute relates to certain alterations which have been effected and are insisted upon by the appellants for the purpose of turning this chapel into a place of public entertainment.

Now I have examined the lease and have come to the same conclusion in regard to it as that arrived at by Buckley L.J.

I do not find anything in it which requires that the building shall be used as a chapel; certain trades are forbidden, but there is nothing to prevent its user for any other trade. Nor is there anything to prohibit internal alterations suitable for such trade. Again, there is a covenant not to vary the front elevation, and a covenant for supporting, upholding, and maintaining. I do not

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regard that covenant as prohibiting such alterations as those in question. It is said that there has been waste. I agree with Buckley L.J. that this is a question of degree. The removal of the wall and iron railing is not, in my opinion, shewn to be a breach of covenant, because it is not shewn that it was in existence at the time of the demise. Nor do I think it is waste in this case if a movable railing is put up in place of it so as to prevent the strip of land which it encloses from being dedicated to the public, and to prevent any question as to the boundary being raised. No harm is done to any one and the reversion is in no way injured.

The opening of a new door in the west wall stands upon the same footing.

I cannot assent to the argument that a lessee with a covenant such as this to maintain can under no circumstances make a new door, or that doing so necessarily amounts to waste. It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease. In the present case I think this alteration was permissible without breach of covenant and without waste.

In regard to the internal changes relating to the staircase and the level of the floor, it seems to me that they are quite legitimate for the purpose which I hold to be allowed by the lease; that, indeed, is the governing consideration. The appellants are willing to deposit a sufficient sum to secure the restoration of this building to its former condition at the end of the lease. As they are asking for an indulgence in regard to other admitted breaches of covenant, I think the execution of this offer should be made a condition of relief without too curiously inquiring whether the offer is in excess of what the Court would exact, and I agree that these terms should be in the form suggested by Buckley L.J.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree.

July 26. On this day the cause came on upon further consideration with regard to the form of the order, and the parties agreed upon an order in the terms stated below.

> *Ordered and adjudged:* 1. *That the appellants have unconditional relief from the forfeiture of the lease dated May* 28, 1845. 2. *That the appellants be at liberty to proceed with and execute the works and alterations specified in the affidavit of R. A. Briggs sworn February* 3, 1911 (*being the works and alterations referred to in this report*). 3. *That the respondent be released from her undertaking as to damages referred to in the order of Horridge J. dated February* 4, 1911. 4. *That each party do pay their and her costs of the actions* Rose *v.* Hyman *and* Rose *v.* Spicer *up to and including the appeal to this House.* 5. *That the injunction granted by Horridge J. dated February* 4, 1911, *be dissolved, and that all further proceedings in the action* Rose *v.* Hyman and Rosenthal *be stayed.* 6. *That the appellants do indemnify the respondent against all costs she may be or become liable to pay to the defendant in the action of* Rose *v.* Spicer *and the respondent undertaking to take no further steps in that action without notice to the appellants and to give notice of discontinuance if and when required by the appellants: Further ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.*
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> *Lords' Journals*, July 26, 1912.

Solicitors for appellants: *John B. & F. Purchase.*
Solicitors for respondent: *Crossfield, Cushing & Wheldon.*

[HOUSE OF LORDS.]

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OWNERS OF THE S.S. DEVONSHIRE . . APPELLANTS;

AND

OWNERS OF THE BARGE LESLIE AND OTHERS . . . . RESPONDENTS.

Admiralty—Ship—Collision—Tug and Tow—Tow in Collision with third Vessel—Tug and third Vessel both to blame—Non-liability of Tow—Admiralty Rule as to Division of Loss—Judicature Act, 1873, *s.* 25, *sub-s.* 9.

There is no principle of admiralty law which precludes an innocent ship damaged by collision through the fault of two other ships from recovering the whole damage from either of the delinquent ships.

The Milan (1861) Lush. 388, discussed.

In cases of collision the question of the identity of a tow with its tug is a question of fact, and where a collision occurs through the faulty navigation of the tug, and the tow is, as regards navigation, completely under the control of the tug and does not stand to the latter in the relation of master and servant, the tow is to be regarded as an innocent ship in no sense identified with the delinquent tug.

Therefore, where a dumb barge in tow of a tug, which had the sole control and management of the navigation, was damaged by collision with a third vessel owing to the faulty navigation of the tug and the third vessel, and the owners of the tow brought an action in rem against the owners of the third vessel only:—

Held, that the defendants were liable for the whole damage.

Decision of the Court of Appeal [1912] P. 21, affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of the President of the Probate, Divorce, and Admiralty Division. (1)

The action was an action in rem and was brought by the respondents, the owners of the barge *Leslie* and her master and mate, against the appellants, the owners of the steamship *Devonshire,* to recover damages occasioned by a collision which occurred between the *Leslie* and the *Devonshire* in the river Mersey at about 4.50 A.M. on February 4, 1911. The facts,

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

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(1) [1912] P. 21.

which were not in dispute upon the appeal, are fully stated in the judgment of the Lord Chancellor, but the following short summary may be found useful.

At the time of the accident the *Leslie*, which was a dumb barge, was being towed by the steam tug *St. Winifred*, to which was entrusted the control and management of the navigation, and was proceeding down the river from Brunswick Dock, Liverpool, to Morpeth Dock, Birkenhead. The *Devonshire*, bound from Belfast to Manchester, was proceeding up the river. The *St. Winifred* with the *Leslie* in tow attempted to cross ahead of the *Devonshire*, and, although the tug succeeded in clearing the bows of the *Devonshire*, the *Leslie* came into collision with the *Devonshire* and sank. The owners of the tug were not made parties to the action.

On May 10, 1911, the President pronounced that the tug *St. Winifred* was partly to blame for the collision in not keeping out of the way of the *Devonshire* and in improperly attempting to cross ahead of her in breach of arts. 19 and 22 of the Regulations for Preventing Collisions at Sea, and that the *Devonshire* was also partly to blame for the collision in not keeping her course and speed in breach of art. 21 of the regulations and in not stopping and reversing her engines in due time, and he reserved for further argument the question whether the appellants were liable for the whole or only a moiety of the damage occasioned to the respondents.

On May 29, 1911, the President delivered judgment on this point, condemning the appellants in the whole damage occasioned by the collision and costs. From this judgment the appellants appealed. The Court of Appeal by a majority (Fletcher Moulton and Buckley L.JJ., Vaughan Williams L.J. dissenting) affirmed the judgment of the learned President and dismissed the appeal.

1912. June 17, 18, 20. *Leslie Scott, K.C.*, and *T. F. Dawson Miller*, for the appellants. 1. The admiralty rule as to division of loss applies to a case like the present where a third ship sustains damage by collision owing to the fault of two others; it is not limited to the case of a collision between two ships both of

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which are found to be at fault. The principle of that rule is not that a plaintiff who is partly himself to blame should be mulcted as to part of the damages on the footing of contributory negligence, but that each of the delinquent ships should be held responsible only to the extent to which it contributed to the loss. The rule is founded upon apportionment of loss, but for convenience division is adopted as a rough and ready mode of apportionment: *Hay* v. *Le Neve.* (1) In *The Milan* (2), which followed *Hay* v. *Le Neve* (1), this rule was applied to the innocent owners of cargo carried on board a vessel in collision caused partly by her own negligent navigation, and in *The Hector* (3) it was applied to the innocent owners of a vessel partly in fault for collision by reason of the negligence of a compulsory pilot. *The Milan* (2) was followed and approved by this House in *The Drumlanrig.* (4) These cases are only explicable as specific instances of a generic principle and are inconsistent with the notion that the rule can be accounted for by attributing it to a difference in the views of the Admiralty and Common Law Courts as to the extent to which contributory negligence should deprive a plaintiff of his right to relief. In *The Vera Cruz* (5) and *The Bernina* (6) the admiralty rule as to half damages was not applied because in each of those cases the action was brought under Lord Campbell's Act, which created a new cause of action and did not profess to give the Admiralty any jurisdiction; consequently it was not an action within the inherent jurisdiction of the Admiralty in rem. Those cases, therefore, do not affect the appellants' contention. The history of the rule, which is of ancient origin, is given in Marsden's Collisions at Sea, 6th ed., pp. 133—145. [They also cited on this point *Boucher* v. *Clyde Shipping Co.* (7)]

2. In 1873, when the Judicature Act was passed, there existed a system of admiralty law distinct from the common law system, and that system has not been abolished by that Act. In the Court of Appeal Fletcher Moulton L.J. treated s. 25, sub-s. 9, as

(1) (1824) 2 Shaw Sc. Ap. 395.
(2) Lush. 388.
(3) (1883) 8 P. D. 218.
(4) [1911] A. C. 16.
(5) (1884) 9 P. D. 96; 10 App. Cas. 59.
(6) (1887) 12 P. D. 58; (1888) 13 App. Cas. 1.
(7) [1904] 2 I. R. 129.

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impliedly abolishing the admiralty law in any case not covered by the words of that sub-section, and he assumed that the Judicature Act applied the common law in every case except where some other law is expressed to prevail, but the Act contains no general provision that in a conflict between admiralty and common law the latter shall prevail, and, where one system is intended to prevail over another, the Legislature uses express language. Under s. 16 the jurisdiction of the several Courts therein mentioned, including the Admiralty Court, is transferred to the High Court, which is to continue administering the jurisdiction of each of those Courts in the same way as before. At the date of the passing of that Act there were two separate systems relative to the issue—admiralty and common law. There was no reason for abolishing either system, and there is no presumption on the transfer of the two separate jurisdictions to a joint Court of an intention on the part of the Legislature to apply one system rather than the other. The burden is not on the appellants to shew that the admiralty system has not been superseded, but on the respondents to shew that it has been; and, further, there are many cases in which the admiralty system has been administered since the passing of the Act of 1873, e.g., maritime lien. The difference between the admiralty law and the common law is illustrated by *The Lemington*. (1) [They also referred to *Tuff* v. *Warman*. (2)]

3. From the point of view of admiralty law the faulty navigation of the ship is not the same thing as the liability of the owners, and, if the navigation is in fault, the admiralty rule will be applied even though the owner may not be personally liable, as, e.g., in the case of a compulsory pilot. The fact that the navigation was put into control of the tug did not make the navigation of the tow any less faulty, and if the navigation of the tow is at fault it may be within the strict words of sub-s. 9 of s. 25 of the Judicature Act. As regards faulty navigation the tow is identified with the tug, and, although the owners of the tow may be absolutely innocent, yet when they come to claim damages they can claim one half only. This point was not

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(1) (1874) 2 Asp. M. L. C. 475.
(2) (1857) 2 C. B. (N.S.) 740; affirmed (1858) 5 C. B. (N.S.) 573.

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considered by the Lords Justices, who have confounded the fault of the ship with the liability of the owner. [Upon this point they referred to *The Avon and Thomas Joliffe* (1); *The Niobe* (2); *The Cleadon* (3); *H.M.S. Sans Pareil* (4); *The Quickstep* (5); *The Englishman and The Australia* (6); *The Stormcock* (7); *The W. H. No.* 1 *and The Knight Errant.* (8)]

4. The tow was in fault under the terms of the Merchant Shipping Act, 1894. That Act imposes on owners of vessels a statutory obligation to obey the regulations for preventing collisions at sea and provides that in collision actions any ship infringing those regulations shall be deemed to be in fault unless it is shewn that the circumstances made a departure from the regulations necessary: ss. 418, 419. The tow took a wrong course, following the course of the tug, and it is not open to the owner of a tow that has taken a wrong course in violation of a navigation rule to say that he delegated the navigation to an independent contractor.

[VISCOUNT HALDANE L.C. This point was not taken in the Courts below, and in the circumstances I should be loath to decide the case upon a point like this.]

Bailhache, K.C., and *D. Stephens*, for the respondents. The Maritime Conventions Act, 1911, s. 1, puts the case as the respondents would put it. To succeed, the appellants must make out one or other of these propositions: (1.) that the old notion of identity between tug and tow exists in all its force; (2.) that the admiralty rule is that when two tortfeasors do damage to a third party each is only liable for one half. Then as to the effect of s. 25, sub-s. 9, of the Judicature Act, 1873, there was and is in the Admiralty Court a jurisdiction which is distinct from that of the Common Law Courts, e.g., prizes. Also there were certain cases, e.g., under Lord Campbell's Act, in which no conflict could arise because there was no admiralty jurisdiction. Lastly, there were the cases in which both ships were at fault.

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(1) [1891] P. 7.
(2) (1888) 13 P. D. 55; [1891] A. C. 401, at pp. 404, 407.
(3) (1860) Lush. 158.
(4) [1900] P. 267, at p. 285.
(5) (1890) 15 P. D. 196.
(6) [1894] P. 239.
(7) (1885) 5 Asp. M. L. C. 470.
(8) [1910] P. 199; [1911] A. C. 30.

There there was a variance. By the common law when both were at fault the plaintiff could recover no damages; by the admiralty rule the damages were divided. The Judicature Act did away with that conflict and said that the admiralty rule was to prevail. It is not to be supposed that the Legislature would treat one case of variance and leave others untouched; but in cases of concurrent jurisdiction there never was any other variance between the admiralty and the common law. The sub-section does not deal with the respondents' case because there must be two vessels in collision and both the colliding vessels must be at fault, and the rule applies not only to the ships themselves, but to the innocent owners of cargo on either of the ships. As to the question of identity, if there is complete identity the collision is not between three ships, but two, and in that case the appeal ought to succeed. But the non-identity of tug and tow has been established in *Union Steamship Co.* v. *Owners of the Aracan* (*The American and The Syria*) (1), which was followed in *The Niobe* (2) and *The Quickstep*. (3) The question of identification turns on the question whether the relation of master and servant existed between the owners of the tow and the owners of the tug and is a question of fact in each case. *The Lemington* (4), where a chartered ship was in collision owing to faulty navigation while under the control of the charterers, and it was held that the owners, though not liable at common law, were liable at admiralty although they were not to blame, can only be supported on the footing of the charterers being treated as the agents of the owners; otherwise it is inconsistent with and must be treated as overruled by *The Castlegate* (5) and *The Utopia*. (6) If it were true that a barge being in tow was in fault by reason of the faulty navigation of the tug, then the judgment ought to be that the tug and tow together were in fault. There is a close analogy between an innocent tow in charge of a faulty tug, innocent cargo on board a faulty ship, and an innocent ship damaged by two faulty ships, and the law ought to be in each case that the innocent party should not suffer. In *The Milan* (1), no doubt, Dr. Lushington treated the admiralty rule as applicable to an innocent owner of cargo on board a faulty ship, but there is no authority for the proposition that when a tow is in charge of a tug, and is not responsible for the navigation of the tug, the tow is in fault. Dr. Lushington does not pretend to give the reason for the admiralty rule as applied to owners of cargo, and if the rule were so well known as he says it is difficult to understand why he should have examined in detail the common law case of *Thorogood* v. *Bryan* (2) and declined to follow it. Probably the rule had its origin in identification of ownership of ship and cargo, at a time when there was identification in fact, and the rule survives although the identification has ceased. That was the view taken in *The Frankland.* (3) The existence of the rule cannot now be questioned, because that is settled by *The Drumlanrig* (4), but it can no longer be put upon any logical basis. It might of course be said that the cargo is to be considered as part of the res. That is a closer identification than the identification of a ship at the end of a tow rope with the tug that is towing her. The authority of *The Milan* (1) cannot now be disputed, but the admiralty rule has never been extended beyond the case of two delinquent ships in collision and the cargo on board of either, and that is why s. 25, sub-s. 9, of the Judicature Act is expressed as it is. The rule has never been applied to an innocent ship where the collision is caused by the fault of two others. *The Avon and Thomas Joliffe* (5); *The Englishman and The Australia* (6); *The Frankland* (3); *The Harvest Home.* (7) The last case was reversed on appeal, but on other grounds. (8) There is no authority for the contention of the appellants that the cases cited by them as being in conflict with the common law are mere illustrations of a generic principle, and it is now too late to introduce into the admiralty law by analogy a new principle, and a principle at variance with the common law. As to compulsory pilotage, the

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(1) (1874) L. R. 6 P. C. 127.
(2) [1891] A. C. 401.
(3) 15 P. D. 196.
(4) 2 Asp. M. L. C. 475.
(5) [1893] A. C. 38, 52.
(6) [1893] A. C. 492, 499.

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(1) Lush. 388
(2) (1849) 8 C. B. 115.
(3) [1901] P. 161.
(4) [1911] A. C. 16.
(5) [1891] P. 7.
(6) [1894] P. 239.
(7) [1904] P. 409.
(8) [1905] P. 177.

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Courts have taken a middle course and have said that although the ship shall not be liable to pay anything it shall not be entitled to recover more than one half.

Leslie Scott, K.C., in reply. The principle asserted by the appellants has been applied in the United States: *The Sterling and The Equator* (1); *The City of Hartford and The Unit.* (2) *The Avon and Thomas Joliffe* (3), where Butt J. declined to follow those cases, was wrongly decided and ought to be overruled.

The House took time for consideration.

July 19. VISCOUNT HALDANE L.C. My Lords, in the early morning of February 4 in last year a collision took place in the Mersey between the steamship *Devonshire* and the dumb barge *Leslie*. The barge, having no propelling apparatus, and being adapted solely for being towed, was in tow of the tug *St. Winifred*, and was proceeding from Runcorn down the Mersey to the Morpeth Dock at Birkenhead with a cargo of Manchester goods. The *Devonshire*, which was bound from Belfast to Manchester with a general cargo, was coming up the river on the starboard bow of the *St. Winifred*. The *St. Winifred* and the *Leslie*, which being in tow was altogether under her control, attempted to cross ahead of the *Devonshire* by starboarding their helms. The *Devonshire* did not keep her course, but ported her helm, and afterwards, but too late, stopped and reversed her engines. The tug managed to cross the bows of the *Devonshire*, but the starboard side of the *Leslie*, her tow, came into collision with the *Devonshire*, and the *Leslie* foundered and sank. No serious damage appears to have been sustained by the *Devonshire*.

The owners of the *Leslie* and her master and mate, suing for the loss of their effects, brought in the Probate, Divorce, and Admiralty Division an action against the owners of the *Devonshire* for damages. The action was tried before the President of the Division. On May 10, 1911, the learned judge decided on the facts that the tug *St. Winifred* and the *Devonshire* were both to blame. On May 29 he gave judgment condemning the defendants, the owners of the *Devonshire*, to make good the whole

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(1) (1882) 16 Otto, 647.

(2) (1877) 7 Otto, 323.

(3) [1891] P. 7.

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of the damage. The defendants appealed, and on December 1 a majority of the Court of Appeal, consisting of Fletcher Moulton and Buckley L.JJ., affirmed the judgment. Vaughan Williams L.J. dissented.

The defendants have appealed to this House. They accept the decision on the facts of the judge of first instance, and their appeal is confined to the question of law: whether, under the circumstances, they ought to have been condemned in the whole of the damages or merely in half.

Shortly stated, their case is that, the tug as well as the *Devonshire* having been found to be in fault, the admiralty rule as to division of loss applies, and the *Devonshire*, as one only of two delinquents, was liable for merely a moiety of the damage. They contend, further, that the owners of the tow, having committed its navigation to the tug, cannot be treated as though the tow was in the position of a wholly innocent ship, and, at all events, cannot be in a better position than the owner of cargo on board a ship which is partly to blame, such owner being, they say, precluded from recovering more than half the damage to his cargo from the owners of the other delinquent ship. The questions thus raised to some extent involve consideration of the principles which govern the relations of the Admiralty Court jurisdiction to that of the common law. For by the common law, if the respondents were entitled to succeed, they would plainly be entitled to recover the whole of the damages, and this right can be cut down only by shewing that there exists an admiralty rule which displaces it.

It is not necessary for the purposes of this appeal to investigate in detail the origin of the jurisdiction of the Admiralty Court. It is sufficient to say that this jurisdiction had its origin mainly in the authority of the Lord High Admiral of England, the custos maris, who exercised the jurisdiction of the Crown in respect of the command and charge of the sea. The admiralty judge of later years was in theory his deputy. By degrees the Court of the Lord High Admiral acquired an extensive jurisdiction in civil suits relating to the sea and the estuaries of rivers, and a body of maritime law grew up founded on the unwritten usages of seafaring men and on the traditions of other countries, such as the so-called law of Rhodes and the customs of Oleron. It was inevitable that sharp conflict should arise between this jurisdiction and that of the Courts of common law, and accordingly, from the period of Richard II. downwards, statutes were from time to time passed which endeavoured to limit the title of the Court of Admiralty to take cognizance of rights relating to maritime matters, but arising out of transactions on land. The popularity of the Court of Admiralty appears to have rested in a considerable measure on its freedom from certain technical rules of procedure which were applied inexorably by the Courts of common law, and on its power to proceed in rem.

This power was so different from the procedure of the Common Law Courts that the latter did not attempt prohibition against its exercise, and in consequence the system of initial arrest of the ship and cargo in order to found jurisdiction gradually developed into an extensive practice. Some account of its growth is to be found in the judgments in this House in *Mersey Docks and Harbour Board* v. *Turner*. (1) When the Judicature Act of 1873 was passed, the Admiralty Court had thus come to possess a well-defined and large jurisdiction, which had frequently been recognized by statute, and a body of law which it alone administered. By s. 16 of the Act of 1873 the jurisdiction of the High Court of Admiralty was transferred to the new High Court of Justice, and the effect of s. 24, sub-s. 6, was to bind this Court to give effect to all rights and duties existing by custom, as did those under admiralty law. Sect. 25, sub-s. 9, which is, according to one possible view, an important section for the purposes of this appeal, however, enacted that "in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail."

At common law, unless the tow in the present case is to be regarded as having been so identified with the tug as to have been guilty with her of faulty navigation, there is no doubt, as I have already said, that the owners of the tow, as being an innocent

(1) [1893] A. C. 468.

vessel, would be entitled to recover the whole of the damage from the appellants.

The first question which arises is, therefore, whether the tow is to be regarded as thus being in fault like the tug. Then there is the further question whether, if the tow is not in fault, an admiralty rule precludes her from recovering more than half her damage from the *Devonshire*, by reason of the latter having been only one of two guilty ships, the tug having been the other.

It seems clear that by admiralty law the whole of the damage to an innocent ship by collision could be recovered if the party defendant was exclusively to blame, and that whether his proceedings were in rem or in personam. If, however, the owner of one ship brought an action against the owner of another for damage by collision, and both the plaintiff and defendant ships were found to blame, the party proceeding recovered only a moiety of the damage. Perhaps the best exposition of the principles on which these rules rest was given by Lord Stowell in the case of *The Woodrop-Sims*. (1) "There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other vis major: In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.—Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.—Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burthen.—Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other."

The passage I have quoted was referred to with approval in this House in *Hay* v. *Le Neve* (2), decided in 1824. In *The Milan* (3) Dr. Lushington did not extend the fourth of Lord

(1) (1815) 2 Dods. 83.
(2) 2 Shaw Sc. Ap. 395.
(3) Lush. 388.

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Stowell's principles to the case of an innocent cargo owner whose cargo was on board one of two ships in fault, and decided that the cargo owner could only recover half his damage against the particular ship sued. He came to this conclusion, however, not on the ground that the owner of the cargo was constructively to blame, as had been contended in reliance on the common law case of *Thorogood* v. *Bryan* (1), but because he held that the admiralty rule limited the liability to half of the damage in the case of each of two ships both to blame and that the cargo owner was not entitled to affix to the ship which he had selected as defendant more than half the blame and damage.

In so far at least as he refused to follow *Thorogood* v. *Bryan* (1), his decision was approved by this House in the case of *The Bernina.* (2)

I have now to consider whether the principle thus applied to cargo on board one of two ships both to blame applies also to a tow under the control of a tug which is equally to blame with a defendant third ship.

In the case of *The Quickstep* (3) Butt J., in delivering the judgment of Sir James Hannen and himself, laid down that, where a tug and its tow came into collision with an innocent ship, the question whether the owners of the latter can recover damages against the owners of the tow depends on whether the relation of master and servant obtains between the owners of the tow and those of the tug. Unless this relation is established, he said that there was no liability on the part of the tow. I think that, as the doctrine of identification as enunciated in *Thorogood* v. *Bryan* (1) has now been swept away, the principle so laid down was right, and that it is a simple application of the rule established in the well-known case of *Quarman* v. *Burnett.* (4) No relation such as that of master and servant was established in the present case, and the tow was therefore an innocent ship, and its owners are at common law entitled to recover the whole of their damage from the owners of the *Devonshire.* This disposes of one of the appellants' contentions, and on principle I think that it also disposes of the contention that blame for breach of

(1) 8 C. B. 115, 129.
(2) 13 App. Cas. 1.
(3) 15 P. D. 196.
(4) (1840) 6 M. & W. 499.

sailing regulations can be affixed to the tow: *Morgan* v. *Castlegate Steamship Co.* (1) and *The W. H. No.* 1 *and The Knight Errant.* (2)

The second point made by the appellants is that the analogy of the decision in *The Milan* (3), as to the right of the owners of cargo on board one of two ships to blame being limited to one half the damage as against the other ship, applies to the case of the *Leslie.*

The first question which arises on this point is whether there was a rule in force in the Court of Admiralty which limited the right of an innocent tow to recover in such a case as the present. I have examined the authorities such as they are, and I do not think that they establish any general rule which covers the case. *The Milan* (3) is the authority which comes nearest to suggesting what the appellants contend for. But when the judgment of Dr. Lushington is examined I think it appears that, while he rejected the case for identification so far as based upon the common law principle said to be laid down in *Thorogood* v. *Bryan* (4) with reference to a passenger in an omnibus, he still may be taken to have considered that the fact of the cargo having been on board one of the ships to blame was a circumstance material to be taken into account in deciding whether the cargo owner could so dissociate his cargo from the ship as to be outside the admiralty rule. The language of his judgment appears to me to be open to the criticism that he does not make it plain whether he was influenced by a view which would account for his conclusion if he held it, or whether he meant to lay down the much broader principle now contended for, to be applied in all cases where an innocent third party sued one of two delinquent ships. If the former, then the decision in *The Milan* (3) is authority for the application of the rule to the case of cargo on board one of two delinquent ships, an application which was approved by this House in *The Drumlanrig* (5), but for nothing further.

If he meant to lay down the more general proposition, it is sufficient to say that it was unnecessary for a decision concerned merely with cargo forming one res with the ship, though differently owned, and that the general proposition is, to say the least, by no means clearly borne out by either the older or the subsequent authorities. Where, as in the present case, the tow was completely under the control of the tug, and did not stand to the latter in the relation of master and servant, I think that the tow is to be considered as an innocent ship in no sense identified with the delinquent tug, and I see no reason for extending to a tow so situated the analogy of cargo on board a ship to blame. I agree with the reasoning on this point in the judgments of Fletcher Moulton L.J. and Buckley L.J.

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(1) [1893] A. C. 38, per Lord Watson at p. 52.

(2) [1910] P. 199; [1911] A. C. 30.

(3) Lush. 388.

(4) 8 C. B. 115, 129.

(5) [1911] A. C. 16.

I have come to the conclusion that the appellants have failed to shew that there was a rule in force in the Court of Admiralty that the owners of an innocent ship could not recover the whole of the damage she had sustained against one of two ships both to blame for a collision with her. Apart from s. 25, sub-s. 9, of the Judicature Act, 1873, I am, therefore, of opinion that the respondents are entitled to succeed. This renders it unnecessary to decide the point whether, when the conclusion has once been reached that the tow was innocent, the section in question entitles them to succeed on another ground. This is not a case in which the ships of the appellants and respondents have both been found to be in fault, and if not, the section does not apply to the case. It has been argued that the words mean to go further, and to exclude any other case than that of ships both to blame, and that the Legislature intended to provide that as between ships both to blame, and in such cases only, the admiralty rules should prevail if these were at variance. And it is said that this may well have been so, because those who framed the statute considered it was only in such instances that there was substantial variance in the rules as to liability for collision. On this question I think it best to express no opinion in the present case. I have arrived independently of any conclusion about it at the result I have indicated.

I move your Lordships to dismiss the appeal with costs.

Earl of Halsbury. My Lords, I have had the advantage of reading the judgment which my noble and learned friend Lord Atkinson is about to deliver, and I entirely concur with it, and will not trouble your Lordships with any judgment of my own.

Lord Ashbourne. My Lords, I concur in the conclusion announced by the Lord Chancellor. There is no dispute in the facts, which were ascertained and decided by the learned President of the Probate, Divorce, and Admiralty Division. It is, therefore, unquestioned that the *Devonshire* and the tug *St. Winifred* were both to blame, and that the *Leslie*, which foundered and sank as the result of the collision with the *Devonshire*, was entirely innocent. The defendants have been held liable by the President and the Court of Appeal to pay the whole of the damages. They contend that they are only liable to pay the half, and that is the question on this appeal.

There is nothing in the facts of this case to make the tow responsible for the navigation of the tug. This is not a question of law, but a question of fact, to be determined in each case on its own circumstances.

Naturally s. 25, sub-s. 9, of the Judicature Act, 1873, has been much discussed before your Lordships, and if this case does not come within it I cannot see that the appellants have any case. It clearly does not come within its words, as the *Leslie* was completely exonerated, and I can see no warrant or justification for any straining or stretching of its terms, so as to include a case like the present. When the tow is not in fault, where can any rule be found that precludes her from recovering more than half her damage from the *Devonshire*, simply because another ship, the tug, was also guilty?

I can see no ground for extending to the *Leslie* the analogy of cargo on board a ship to blame.

I do not think that any good purpose would be served by discussing in further detail the authorities dealt with in the judgment of the Lord Chancellor.

The appellants are really seeking to go beyond the rules of the common law as amended by s. 25 of the Judicature Act, and to make a new rule for which I can see no justification and no jurisdiction.

In my opinion, the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I concur. This case upon the findings of fact resolves itself into one where a vessel, in herself innocent of any fault in her navigation, is brought into collision and sunk by the joint negligence of the tug which towed her under the conditions mentioned, and of the steamship with which she collided.

The question for decision is, What is the principle on which the damages to which the owners and these members of the crew of this innocent vessel are respectively entitled are to be assessed? Are the plaintiffs entitled to recover the full amount of the damages against each of the joint tortfeasors, as they would admittedly be in the case of an action at common law, or is there some general principle of the admiralty law applicable to the case, by which the damages are to be awarded to the owner and crew of the barge against each of the tortfeasors in equal moieties? The appellants, the owners of the *Devonshire*, insist that the latter is the true principle on which this question is to be solved. The respondents, the plaintiffs, on the contrary, insist that the former is the true principle. The learned President of the Probate and Admiralty Division and the majority in the Court of Appeal have decided in favour of the respondents' contention. The question is not free from difficulty. The appellants insist first that when the jurisdiction of the Court of Admiralty was, by the 16th section of the Judicature Act of 1873, transferred to and vested in the High Court of Justice, there was, where not otherwise enacted, transferred with it the whole body of the special law theretofore administered by the Court of Admiralty, and that when any judge proceeds under that statute, or under the amending Act of 1875, to exercise the jurisdiction so transferred, he must do so according to the rules and principles of admiralty law thus attached to the transferred jurisdiction. Now it is admitted by counsel on both sides that, according to the system of jurisprudence formerly administered by the Court of Admiralty, where two ships collide inflicting damage upon each other and both are held to have been to blame, each can recover against the other only one half the damage she has herself in fact sustained.

It is further admitted that it has been recently definitely decided in this House in *The Drumlanrig* (1), approving of Dr. Lushington's decision, given in the year 1861 in *The Milan* (2), that the innocent owner of cargo carried on one of two colliding ships, both of which are to blame, can only recover one half of the damages he has sustained against the owners of the ship which carried his cargo. The other half he must recover from the other tortfeasor, the owner of the other colliding ship. It is admitted, in the third place, that where one of two colliding ships, both of which are held to have been to blame, was at the time of collision in charge of a compulsory pilot, the Court of Admiralty has held, on some principle of compromise, that because the navigation of both ships has been faulty, the owners of the ship in charge of the pilot can only recover from the other ship a moiety of the damages she has herself sustained, but that as she was obliged to give control to the pilot, whose bad navigation caused the collision, she is not liable to pay any damages to the owner of the other colliding ship: *The Hector.* (3) The ship in charge of the compulsory pilot thus pays nothing herself, and only recovers half the damage done to her. And, lastly, it was similarly admitted that, by the decisions in *The Bernina* (4) and *The Drumlanrig* (1), it must be taken to have been definitely established that neither the cargo nor the passengers carried by a ship negligently navigated, nor yet a member of her crew not responsible for that negligent navigation, can be held to be identified with the ship, on the principle laid down in *Thorogood* v. *Bryan.* (5)

The point upon which controversy arises between the parties is as to how these particular instances are to be regarded, and what is the conclusion to be deduced from them. Counsel on behalf of the appellants contend that they are but applications of an old and general principle of admiralty law, differing altogether from the principle of the common law, that there is to be contribution between tortfeasors, and that each delinquent is only to be mulcted according to the degree of his culpability for the joint wrong; that for convenience in practice the damages have been divided into equal moieties, but that the principle above mentioned is the true origin of the limitation of damages as practised; while on the other hand counsel for the respondents contend that these instances are merely exceptions to the general rule or principle of law, common to Courts both of common law and admiralty, that there is not to be contribution between joint tortfeasors, and that each is liable for the entire damages inflicted on an innocent person by their joint wrong.

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(1) [1911] A. C. 16.

(2) Lush. 388.

(3) 8 P. D. 218.

(4) 13 App. Cas. 1.

(5) 8 C. B. 115.

If this latter contention be right, then all those exceptions are preserved intact and perpetuated by s. 25, sub-s. 9, of the Supreme Court of Judicature Act of 1873. If, on the contrary, it be wrong, then, for some unexplainable reason, the Legislature has by that sub-section limited itself to providing expressly that in claims for damages arising out of a collision between two ships, both being found to be in fault, the rules or principles of law hitherto in force in the Court of Admiralty shall prevail over the rules or principles of the common law where the two are in conflict, but has left this principle of admiralty to take care of itself in all other instances. No reason satisfactory to my mind has been given for such a halting and partial selection as this. Instead of an enactment so restricted, one would have expected to find a general enactment to the effect that the principle of law as to contribution between joint tortfeasors and the limitation of damages hitherto in force in the Court of Admiralty should continue to be administered by the Probate and Admiralty Division, and should, when in conflict with the rules and principles of the common law, prevail, or some enactment to the like effect.

In *The Bernina* (1) the representatives of two persons who were on board one of two colliding ships, each of which ships had been negligently navigated at the time of the collision, and were drowned, one being a passenger and the other a member of the crew not in any way responsible for the negligent navigation of his ship, were awarded the full amount of the damages to which they were respectively entitled under Lord Campbell's Act (9 & 10 Vict. c. 93) against the owners of the other colliding ship. But Lord Lindley in the Court of

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(1) 12 P. D. 58; 13 App. Cas. 1.

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Appeal (1) pointed out with convincing force that actions of this kind could not, before the Judicature Act, have been brought in the Court of Admiralty at all; that s. 25, sub-s. 9, had no application to such actions; and that if entertained now in the Probate and Admiralty Division it was by virtue of its jurisdiction as a Division of the High Court of Justice and not by virtue of the special jurisdiction of the former Court of Admiralty which had been transferred to it. In the appeal to this House (2) the applicability of the admiralty rules as to half damages was mentioned but not argued. Lord Herschell, however, expresses his opinion (p. 10) that the other questions raised in the Court below (i.e., the Court of Appeal) were properly dealt with. Save upon the doctrine of identification little assistance can, therefore, be obtained from the case of *The Bernina* (3) to a decision in the present case.

One would have expected that there must have been many cases where, in a collision between two vessels, neither of them in tow of a tug, but both of them to blame, some innocent ship was injured. It was said that such a thing as that is of rare occurrence, and no report of any case of the kind was cited in argument.

Several authorities, however, have been cited where collisions occurred between one vessel and the tug which towed another, or between one vessel and another while the latter was in tow. One of the most important of these is the case of *The Niobe.* (4) There the tug which towed the *Niobe* came into violent collision with a ship called the *Valetta*, inflicting upon her such serious damage that she ultimately sank. The *Niobe* also came into collision with the *Valetta*, but caused her no damage. The President held that the crews of both the *Niobe* and her tug were guilty of negligence in navigating their respective crafts, and that the negligence of each contributed to the collision. He awarded a large sum as damages against the owners of the *Niobe* and the owners of the tug jointly. There was no division of the damages between the two wrong-doers; each was made liable for the whole.

(1) 12 P. D. at p. 84.
(2) 13 App. Cas. 1.
(3) 12 P. D. 58; 13 App. Cas. 1.
(4) 13 P. D. 55; [1891] A. C. 401.

In the course of his judgment the President (Sir James Hannen) said that in the ordinary case the tug is under the control of the tow, and her owner is not in the position of an independent contractor; that the tug and tow are engaged in a common undertaking of which the general management and command belongs to the tow; and following, apparently, Dr. Lushington, gave as a reason for this view, that if a pilot be employed he takes his position on the tow, and that the officers of the tow are usually of a higher class and better able to direct the navigation than those of the tug. That case went no farther, but the owners of the *Niobe*, having paid the damages, sued one of the underwriters on a policy of insurance effected upon her to recover the amount for which he was responsible.

An appeal came to this House, and Lord Watson, at p. 407 of the report, in a passage much relied upon by the appellants, dealt with the doctrine of the identity of a tug with her tow. He thus expressed himself: "The *Niobe* was, in the contemplation of the law, one and the same ship with the *Flying Serpent* (the tug) for all purposes of their joint navigation with a view to avoid the risk of collision; and the fault that led to a collision between that legal composite and the *Valetta* was admittedly the fault, not only of the *Flying Serpent*, but of the *Niobe*."

The contest in the Court of Admiralty was as to whether the *Niobe* was to blame. The tug admitted her liability, but the significance of the decision in relation to the general principle contended for in the present case is that full damages were awarded against tug and tow jointly, and the rule as to the limitation of damages applicable in admiralty cases where the ship of the plaintiff collides with the ship of the defendant, and both are to blame, was not applied. The two tortfeasors were held liable for all the damage caused as they would have been in a Court of common law.

Two years later Sir J. Hannen had again to consider this doctrine of the identity of the tug and tow in a case in which, as in the present case, the reasons given in the case of the *Niobe* for the treating the control of the navigation as vested in the tow could scarcely apply, namely, *The Quickstep*.(1) In that case

(1) 15 P. D. 196.

a hopper barge was in the river Mersey in tow of a tug named the *Quickstep*, and came into collision with a steamship named the *Charles Dickens*. The collision was due to the neglect of the tug to carry the proper lights to indicate to the crew of the *Charles Dickens* that she had a vessel in tow. It was admitted that those on board the hopper barge did not interfere in any way with the navigation of the tug. The county court judge found that there was no negligence on the part of those in charge of the *Charles Dickens* or of the barge, but held the owners of the tug and the owners of the tow jointly liable, on the ground that, the barge having hired the tug to tow her, those in charge of the tug were, in law, the servants of the owners of the tow, for whose negligence these latter were responsible.

An appeal and cross-appeal were lodged against this decision. The Divisional Court held that the *Charles Dickens* and the tug *Quickstep* were both to blame, and adjourned for further argument the point of law, as to whether the tow, though herself blameless, was nevertheless liable for the negligence of those in charge of the tug. The case was subsequently fully argued, all the authorities bearing upon the point in controversy were cited, and in the judgment of the Court, composed of Sir J. Hannen and Butt J., it was laid down that the real question on which the liability of the tow in such cases depends is whether or not the relation of master and servant existed between the owners of the tow and the persons in charge of the tug, that no general rule can be laid down, that the question whether the crew of the tug are the servants of the owners of the tow must depend upon the facts of each case. In that particular case it was clear that "although there were men on board the barge, the navigation was in the hands of the master of the tug, and the bargemen could do nothing to avoid the collision." They accordingly held that both on reason and authority the owners of the barge were exempt from liability for the negligence of the crew of the tug.

In the following year, 1891, the case of *The Avon and Thomas Joliffe* (1) came up for decision. In that case the *Avon*, while in tow of tug, came into collision with another vessel named the

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(1) [1891] P. 7.

Thomas Joliffe. The crews of both the tug and tow were held to have been to blame, and the crew of the *Thomas Joliffe* was held to have been blameless. Sir Charles Butt was pressed to divide the damages between the two wrong-doers on the authority of two American cases, *The Sterling and The Equator* (1) and *The City of Hartford and The Unit.* (2) He refused to do so on the distinct ground that the rule of limitation of damages only applies in admiralty law to cases where the ships of the plaintiff and the defendant have been in collision and have both been found to blame.

In the several cases subsequent in date to 1891 referred to in the judgment of the learned President in the present case, the same principle appears to have been acted upon, and no instance has been found where it was departed from in this country. On the question of the identity of the tow with the tug it is only necessary, I think, to refer to two additional authorities; the first preceded *The Quickstep* (3) in date, and the second was quite recent. The first is the case of *Union Steamship Company* v. *Owners of the Aracan* (4), decided by the Privy Council in the year 1874.

There a disabled steamer, the *Syria*, was being towed home from Ascension by another steamer, the *American*. Both belonged to the same owners. On the voyage the *American* came into collision with and sank the sailing vessel named the *Aracan*, belonging to the plaintiffs. The learned judge of the Admiralty Court said that in fact neither of the crews of the *Syria* or *Aracan* were to blame, but that the crew of the *American* was solely to blame; but notwithstanding these findings the *Syria* must, he thought, be pronounced to blame on the ground that she must in intendment of law be treated as one vessel with the *American*. The Privy Council, after considering several American authorities, reversed this decision, on the ground that there was no evidence of the *American* having been hired by the captain of the *Syria* or having acted in any way under the control of the latter; that on the contrary it appeared that the governing power was wholly with the *American*.

(1) 16 Otto, 647.
(2) 7 Otto, 323.
(3) 15 P. D. 196.
(4) L. R. 6 P. C. 127.

The second is the case of the lightship *Comet* (*The W. H. No.* 1 *and The Knight Errant* (1).) There the lightship, moored at the mouth of the Mersey, was run into and sunk by a hopper barge, *W. H. No.* 1, which was coming up the river in tow of the tug *Knight Errant*. The owners of the lightship sued both the owners of the barge and the owners of the tug for the damages caused by the negligent navigation of the tug and tow, or alternatively of one of them. The then President, Lord Mersey, held that both the tug and tow were in fact to blame. He treated them, he said, expressly (p. 204) as joint tortfeasors, each being liable for all the damages that followed from their wrongful act. The owners of the hopper barge alone appealed. On behalf of the appellants *The Quickstep* (2) was relied upon, and it was urged that, as the barge had no motive power of its own, the crew of the tug were necessarily in sole control of the navigation, that the crew of the tug were not therefore the servants of the owners of the barge, and the crew of the latter not, in fact, guilty of any negligence.

The Court of Appeal, consisting of Lord Halsbury and Fletcher Moulton and Farwell L.JJ., came to the conclusion that the crew of the hopper barge were not, in fact, guilty of any negligence, and allowed the appeal with costs. The plaintiff appealed to this House, when it was again held that the crew of the barge were not, in fact, guilty of negligence, and the appeal was dismissed on this ground. It must therefore, I think, now be taken as conclusively established that the question of the identity of the tow with the tug that tows her is one of fact, not law, to be determined upon the particular facts and circumstances of each case.

Now, in the present case the President has, on the authority of *The Quickstep* (2), found that the owners of the barge were neither actually nor constructively to blame; in other words, that the tug was in sole control of the navigation, and that her crew were not in the position of servants to the owners of the barge. That finding is, as I understand, acquiesced in. It could not, I think, on the evidence be disturbed, so that this case resolves itself into one where two vessels belonging to two different persons, not

(1) [1910] P. 199; [1911] A. C. 30.

(2) 15 P. D. 196.

being plaintiff and defendant respectively in a suit, both ships having been negligently navigated, have inflicted damage on a third vessel by and through their joint wrongful act. In my view the appellants have wholly failed to shew that there ever was any general principle of law administered in the Court of Admiralty, according to which the owners of the vessels in default were, in such circumstances, not treated in the same way as joint tortfeasors are treated at common law, and each made liable for all the damage he helps to inflict. I think the contention of the respondents is right, that the cases relied upon by the appellants as applications of the alleged principle of admiralty law for which they contend are in truth special exceptions from the general rule enforced in the Courts of Common Law and Admiralty alike, namely, that there is to be no contribution between tortfeasors, that all these exceptions are covered, protected, and perpetuated by s. 25, sub-s. 9, of the Judicature Act of 1873. I think, therefore, that the decision of the Court of Appeal was right and should be affirmed, and this appeal be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 19, 1912.

Solicitors for appellants: *Pritchard & Sons, for Collins, Robinson, Driffields & Kusel, Liverpool.*

Solicitors for respondents: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

[HOUSE OF LORDS.]*

H. L. (E.)* EMILY DE COURCY WALFORD AND ANOTHER APPELLANTS

1912

June 21.

AND

MARY JOAN HENSHAW WALFORD . . . RESPONDENT.

Will—Legacy—Demonstrative Legacy—Reversionary Fund—No Time fixed by Will for Payment—Date from which Interest runs.

A testator was absolutely entitled in reversion expectant on the death of his father to a fund appointed to him under the will of his mother subject to the father's life interest therein. The testator, who predeceased his father, bequeathed to his sister the sum of 10,000*l.* to be paid out of the estate and effects inherited by him from his mother in terms of her last will and testament, and the residue of the aforesaid estate and effects of his said mother so to be inherited by him in terms of her aforesaid will and of all his estate and effects then in his possession and enjoyment he gave to other persons. On the death of the father the question was raised from what date the legacy of 10,000*l.* carried interest:—

Held, that the will contained no direction express or implied that payment of the legacy was to be postponed until the falling in of the reversionary fund, and, consequently, that the legacy was payable at and carried interest from the expiration of one year from the testator's death.

The rule of law laid down by Lord Cairns in *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789, applied.

Decision of the Court of Appeal [1912] 1 Ch. 219, affirmed.

APPEAL from an order of the Court of Appeal reversing in part an order of Joyce J. (1)

The appellants, Emily de Courcy Walford and Robert Henry Dunn, in the circumstances hereinafter stated, were the persons entitled under the will of Colonel J. A. H. Walford to the testator's residuary estate; the respondent, Mary J. H. Walford, was entitled under the same will to a legacy of 10,000*l.* payable out of a reversionary fund. The question raised by this appeal was whether this legacy carried interest, as the appellants contended, from the time when the reversionary fund fell into possession,

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

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(1) [1912] 1 Ch. 219.

or, as the respondent contended, from the expiry of a year from the testator's death.

Colonel Walford and the respondent were the children of J. H. N. Walford by his first wife, Mary Walford. The appellant, Emily de Courcy Walford, was the second wife of J. H. N. Walford, whom she survived.

By her will, dated February 20, 1891, Mary Walford, in exercise of a power of appointment given to her by her marriage settlement, appointed to her son Colonel Walford, on the death of her husband, certain property subject to the trusts of the settlement of the value of about 22,757*l.*, and she gave her separate estate to her husband for life with remainder as he should by deed or will appoint among the above-named children of the marriage.

Mary Walford died on January 17, 1900.

By his will, dated March 19, 1901, Colonel Walford bequeathed to his sister, the respondent, the sum of 10,000*l.* sterling as her sole and absolute property "to be paid out of the estate and effects inherited by me from my mother in terms of her last will and testament dated the 20th day of February 1891 and proved on the 19th day of February 1900 And as regards the residue of the aforesaid estate and effects of my said mother so to be inherited by me in terms of her aforesaid will and of all my estate and effects then in my possession and enjoyment" the testator appointed as his sole heir or heirs such heir or heirs as would succeed to the estate of his father, J. H. N. Walford aforesaid, appointed by the last will and testament of the said J. H. N. Walford, or who might succeed him as his next of kin.

Colonel Walford died on July 21, 1903.

By his will, dated September 1, 1908, J. H. N. Walford gave his residuary estate upon trust for the appellant Emily de Courcy Walford, the testator's second wife, during widowhood, and at her death or second marriage he gave everything to the appellant R. H. Dunn absolutely.

J. H. N. Walford died on July 31, 1910.

An originating summons was taken out by the executors of this will for the determination of certain questions arising upon the construction of the several above-mentioned wills, including the question which was the subject of the present appeal.

Joyce J. upon this question held, on the authority of *Earle* v. *Bellingham* (No. 2) (1), that the legacy of 10,000*l.* carried interest only from the date of the death of Colonel Walford's father, when the reversionary fund fell into possession.

The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) reversed the decision of Joyce J. upon this point and held that interest on the legacy ran from the expiration of a year from the testator Colonel Walford's death.

1912. June 20, 21. *Buckmaster, K.C.*, and *J. E. Harman*, for the appellants. The meaning of Colonel Walford's will is that the 10,000*l.* is to be paid out of a fund which could not be a fund for that purpose until it fell into possession. Therefore interest on the legacy runs not from the expiration of a year from the testator's death, but from the time when the fund came into possession. The question is whether the words of this will are not such as to preclude the legatee from demanding payment on the expiration of a year from the testator's death, in which case she could have required that the reversion should be sold. The appellants prefer to base their case upon the language of this particular will, but in *Earle* v. *Bellingham* (No. 2) (1) it was held upon a very similar will that no interest ran until the fund came into possession. The Court of Appeal have founded their judgment on the distinction between demonstrative and specific legacies, but the term "demonstrative legacy" has no meaning unless it occurs in a will where there are also pecuniary legacies. A demonstrative legacy is a class of gift which in the order of administration ranks ahead of a pecuniary legacy and is a legacy with a special claim on a certain fund; but that claim has no meaning unless it is asserted in competition with a general legacy. The point of introducing into this will the fund out of which the legacy was to be paid was that the legacy should be paid when the fund came into possession: *In re Gyles.* (2)

Cave, K.C., and *W. M. Cann*, for the respondent. There is

(1) (1857) 24 Beav. 448.

(2) [1907] 1 I. R. 65.

not to be found in this gift anything which postpones the date of payment; it therefore falls within the rule of law laid down by Lord Cairns in *Lord* v. *Lord* (1) that "where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be made payable out of a particular fund which is not got in until after a longer interval"; and that case merely followed the general principle laid down by Sir William Grant in *Wood* v. *Penoyre*. (2) This legacy is payable quacunque via, but the particular fund indicated by the testator is primarily to bear it. It is an immediate legacy with resort to a particular fund: *Fream* v. *Dowling*. (3)

Buckmaster, K.C., replied.

Viscount Haldane L.C. My Lords, notwithstanding the able argument of Mr. Buckmaster, I cannot say that I entertain much doubt about this case.

The appellants are the persons who, in the events which have happened, are entitled to the residuary estate of a certain Colonel Walford. The respondent is a legatee under Colonel Walford's will. The question in controversy is whether the legacy which was given to the legatee carries interest as from a year after the death of the testator, or whether the right to interest upon it is postponed until the falling in of a reversionary fund out of which the legacy was directed to be paid.

My Lords, the facts of the case are shortly these. Mrs. Walford, the mother of the testator in the cause, died in the year 1900. At her death she had a testamentary power of appointment exercisable in favour of her children by her husband, Mr. Walford, under a marriage settlement. That settlement comprised certain property of the value of some 22,000*l.* in which she had first a life interest under the settlement and her husband a subsequent life interest. By her will, which was made in 1891, she referred to the settlement and then in the exercise of her power of appointment gave and appointed her estate under the settlement to her son Colonel Walford, the testator, absolutely on the decease

(1) L. R. 2 Ch. 782, at p. 789.

(2) (1807) 13 Ves. 325, at pp. 333, 334.

(3) (1855) 20 Beav. 624.

of her husband. Colonel Walford thus took a reversionary interest in the corpus of the 22,000*l.* She then gave and bequeathed all her residue belonging to her for her separate use to her husband for life with remainder as he should by deed or will appoint, and subject thereto between her children, Colonel Walford and his sister the legatee, the respondent in this case.

My Lords, Colonel Walford survived his mother and died in 1903. He was survived by his father, the tenant for life of the settled fund. The father did not die until 1910. Colonel Walford by his will, which was made abroad, gave to his sister, the respondent, "the sum of £10,000 sterling as her sole and absolute property to be paid" (and here are the words on which the question of construction arises) "out of the estate and effects inherited by me from my mother in terms of her last will and testament dated the 20th day of February 1891 . . . . And as regards the residue of the aforesaid estate and effects of my said mother so to be inherited by me in terms of her aforesaid will, and of all my estate and effects at present in my possession,"—these he gave to whoever should be the heir or heirs succeeding to the estate of his father, under his father's will; and he appointed his father executor.

My Lords, the question is shortly this: 10,000*l.* under Colonel Walford's will is bequeathed to his sister, the respondent, to be paid out of the estate and effects inherited by him from his mother. Then he gives the residue of what is so inherited from his mother under her will and all his own residue to (in the events which have happened) the persons who are the appellants in this case. The question is whether there is in this will such a direction as debars the respondent from claiming interest, now that the fund has fallen in on the death of the father, as payable to her as from a year after the death of the testator.

My Lords, the principles which govern cases of this kind are fairly well settled. Legacies are of three kinds: there is the specific legacy which is a specific res secured under the testator's will on his death; and, of course, it does not abate if the rest of the assets are insufficient for the payment of the general legacies; but it has this disadvantage, that if the particular res which is the subject of the specific legacy disappears in the meantime, then the legatee gets nothing. The class of legacy at the other extreme is a general legacy which comes out of the residue and which abates if the residue is insufficient, but which prima facie, under a rule of administration of the Court, carries interest as from a year after the testator's death. There is an intermediate class of legacy, namely, a demonstrative legacy, which is simply a general legacy, with the quality attached to it that it is directed to be paid out of a specific fund, and, if there is a shortage of assets and that fund remains, is paid out of that fund without abating. On the other hand, if the fund does disappear, then it has this advantage over a specific legacy, that it is still payable, in virtue of its quality of a general legacy, out of the testator's residue along with other general legacies. The consequence is that, if the trust fund had disappeared in this case, Miss Walford's legacy would have become payable out of such residue as her brother left behind him, along with any other legacies he might have given.

Now, my Lords, it seems to me that in order to make out that the legacy of 10,000*l.* to Miss Walford, which was directed by her brother's will to be paid out of the reversionary fund, is to be postponed, so far as the title to interest is concerned, until the reversionary fund falls in, you have to make out that there is, expressly or by implication, a direction that the legacy is not to be payable, that there is to be no right to payment, until a certain time, and therefore the right to interest is postponed.

The principle of law is laid down by Lord Cairns in a passage in his judgment in *Lord* v. *Lord* (1) which is quoted by the Master of the Rolls in his judgment in this case. Lord Cairns says in *Lord* v. *Lord* (1): "The rule of law is clear and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval." The question therefore

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(1) L. R. 2 Ch. 782, at p. 789.

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is whether, upon the words in controversy in this case, the legacy is not directed to be paid until a future date. The burden appears to me to be upon those who assert that that is so to make it out, because otherwise the general rule applies, as pointed out in *Lord* v. *Lord* (1), that the right to the payment of the money arises at once, although it is directed to be paid out of a particular fund which will not fall in until afterwards.

My Lords, it may be in this case, if the testator had had his attention called to the point, he would have expressed himself differently and have said, "I do not intend my sister to have the reversionary legacy or claim interest upon it until the falling in of the reversionary fund." That may be; but in my opinion Courts of justice are precluded from entering into such speculations. They are confined, and rightly confined, to applying common sense to the words which the testator has used in his will read as a whole. If within that you can spell out an intention such as I have referred to, well and good. If not, you must not supply it by any conjectures as to what the testator would probably have said if his attention had been called to the point on which it was desirable that he should say something.

Then, my Lords, there is another general observation which I wish to make. In cases of this kind, cases of wills of personal estate, it is useless in nearly all cases to try to compare the will under consideration with some other will upon which there has been a decision. The will in each case must be read as a whole; and unless the words are substantially identical, very little light can be got from a decision on any other will, except so far as that decision lays down some such general principle of construction of wide application as was laid down in *Lord* v. *Lord*. (1) Therefore I do not pause to make observations on the case of *Earle* v. *Bellingham* (No. 2) (2), which was decided one way, nor on the case of *Wood* v. *Penoyre* (3), which was decided another way, nor on the Irish case of *In re Gyles* (4); because those cases were decided on wills the wording of which is very different from the wording here. What I do look at is the language which the testator has used; and the question I put to myself is, Is there to be found here a direction that the legacy is not to be paid till the fund falls in, which displaces what would be the ordinary principle of administration? I am unable to find such a direction; and I therefore come to the conclusion that the view taken by Joyce J. was wrong and the view taken by the Court of Appeal was right. I agree with the judgments delivered by the Master of the Rolls and Farwell L.J., and I move your Lordships that this appeal be dismissed with costs.

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(1) L. R. 2 Ch. 782.
(2) 24 Beav. 448.
(3) 13 Ves. 325.
(4) [1907] 1 I. R. 65.

Earl of Halsbury. My Lords, I have nothing to add.

Lord Ashbourne. My Lords, I concur.

Lord Macnaghten. My Lords, I agree with Mr. Buckmaster that the question in this case is not to be solved by simply styling this bequest a demonstrative legacy. I think, having regard to the circumstances of the case, the relationship of the parties, and the language of the mother's will, which is pointedly referred to in the testator's will, and also the testator's own language, it is more probable than not that the testator intended that his sister should have no claim for payment until the death of the father. At the same time I must say that if that was his intention he has not made it sufficiently plain to authorize your Lordships to give effect to it in this appeal.

Lord Atkinson. My Lords, I concur. I think there is not to be found in the will any sufficiently clear expression of an intention that the payment of the legacy should be postponed until the reversionary fund had come into possession.

Appeal dismissed with costs.

Lords' Journals, June 21, 1912.

Solicitors for appellants: *Trotter & Patteson.*

Solicitors for respondent: *Johnson, Weatherall & Sturt, for George Hadfield, Bennett & Carlisle, Manchester.*

[HOUSE OF LORDS.]

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TAYLOR . . . . APPELLANT;

AND

DENNY, MOTT & DICKSON, LIMITED . . RESPONDENTS.

Arbitration—Refusal of Arbitrators to appoint Umpire—Application to Court to appoint—Practice—Parties—Service on Arbitrators—Arbitration Act, 1889 (52 *&* 53 *Vict.* c. 49), *ss.* 5, 20.

Under the special jurisdiction conferred upon the Court by s. 5 of the Arbitration Act, 1889, to appoint an umpire in references falling within the section, it is competent to the Court, where two arbitrators having liberty to appoint an umpire fail to comply with a notice under that section requiring them to concur in an appointment, to bring the arbitrators before it in order to ascertain their views before making an appointment, due provision being made for their costs.

A dispute having arisen upon a contract for sale, the respective parties, under a submission to arbitration, appointed arbitrators with power to appoint an umpire. The arbitrators having failed to comply with a notice served upon them by the purchasers under s. 5 of the Arbitration Act, 1889, requiring them to appoint an umpire, the purchasers issued an originating summons, to which the arbitrators were made respondents, asking the Court to appoint an umpire. The vendors were not made respondents to the summons as they were not within the jurisdiction. The arbitrator appointed by the vendors objected that he was not a proper party to the summons and that the vendors ought to be made parties thereto. The judge in chambers made an order appointing an umpire, with liberty to the vendors to discharge the order within a given time after receiving notice thereof, the costs to be costs in the arbitration, and his order was affirmed on appeal:—

Held, that the objection as to the form of the summons failed and that the arbitrators were the proper parties to bring before the Court.

APPEAL from an order of the Court of Appeal affirming an order of Lush J. in chambers.

The appellant, C. T. Taylor, was a timber merchant carrying on business in Liverpool, and the respondents, Denny, Mott & Dickson, Limited, were timber merchants carrying on business in London.

The Standard Export Lumber Company, Limited, hereinafter

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referred to was a company incorporated under American law in New Orleans and not carrying on any business in England.

By a contract in writing dated March 9, 1910, made in London between the Standard Export Lumber Company, Limited, hereinafter called the vendors, through the agency of Price & Pierce, Limited, timber brokers, of London, and Denny, Mott & Dickson, Limited, hereinafter called the purchasers, the former sold to the latter a quantity of pitch pine timber of which 598·71 standards were shipped from Gulf Port to Delagoa Bay. The purchasers alleged that part of the shipment was of defective quality and was not in accordance with the contract, and this allegation was denied by the vendors. A dispute having thus arisen between the parties to the contract, by a submission, dated April 24, 1911, it was agreed to refer such dispute to J. N. Lamb as arbitrator on behalf of the purchasers and to Taylor as arbitrator on behalf of the vendors, with power to them to name an umpire.

The arbitrators were unable to agree upon an umpire, Lamb desiring to appoint a lawyer and Taylor desiring to appoint a member of the timber trade. Thereupon the purchasers served upon each of the arbitrators a notice in writing pursuant to s. 5 of the Arbitration Act, 1889, requiring them to concur in the appointment of an umpire. The arbitrators having failed to comply with this notice, the purchasers issued an originating summons, to which the arbitrators alone were made respondents, calling upon them to attend before the Master in chambers upon an application by the purchasers for an order that an umpire might be appointed by the Court pursuant to s. 5 of the Arbitration Act. The vendors, being out of the jurisdiction, were not made respondents to the summons.

At the hearing before the Master, Taylor took the objection that he was not a proper party to the summons and that the summons disclosed no cause of action against him and ought to be dismissed as against him with costs. The Master, however, overruled this objection, and Taylor then contended that a member of the timber trade and not a lawyer should be appointed as umpire. The Master ordered that George Wallace, Esq., K.C., be appointed umpire under the submission and that the time for making the award be extended for three months, the costs of the application to be costs in the arbitration.

Taylor appealed to Lush J. in chambers, and repeated his objection as to the form of the summons.

Lush J. was of opinion that the vendors ought to have been made parties to the summons, but, being further of opinion that Taylor, having no personal interest in the matter, had no right to appeal, he came to the conclusion, though with considerable hesitation, that he had power to make an order on the summons ex parte. He accordingly dismissed the appeal and ordered that the time for making the award should be extended for three months and that the vendors should be at liberty to apply to discharge the order of the Master and the present order within one month, the costs of the appeal to be costs in the arbitration, subject to any contention by the vendors that the costs ought to be borne by any party to the summons.

Notice of this order was duly given to the vendors.

Taylor appealed to the Court of Appeal.

The Court of Appeal (Vaughan Williams L.J. (who doubted but did not dissent), Buckley L.J., and Kennedy L.J.) dismissed the appeal, and ordered that the costs of the proceedings should be costs in the arbitration, but without prejudice to any contention by the vendors that such costs should be borne by any party to the summons. They further ordered (1.) that if the vendors raised such contention the purchasers should be at liberty to raise any contention of the same kind, and (2.) that the month within which the vendors should be at liberty to apply to discharge the orders of the Master and Lush J. should be a month from the giving of the notice above referred to, and they extended the time for making the award for a further period of three months. They also gave leave to Taylor to appeal to the House of Lords.

Atkin, K.C., and *W. A. Jowitt*, for the appellant. Where an application is made to the Court under s. 5 of the Arbitration Act, 1889 (1), by one of the parties to an arbitration to

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(1) Arbitration Act, 1889:

Sect. 5. "In any of the following cases:—

"(*a*) Where a submission provides that the reference shall be to a single arbitrator, and

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appoint an umpire, the other party to the arbitration ought to be made a party to the application and the arbitrators ought not to be made parties. Hitherto the universal practice has been to make an application of this kind inter partes, and the Court ought not to make an appointment in the absence of one of the parties interested in the subject-matter of the adjudication. The result of the practice appealed against would be that the other party to the arbitration might never have heard of the matter. This summons ought to be dismissed as against the appellant as irregular inasmuch as it discloses no cause of action against him. The appellant has an interest in appealing because the order makes no sufficient provision for his costs. The costs are made costs in the arbitration, but there is no certainty that an award will ever be made.

Ernest Pollock, K.C., and *Stuart Bevan*, for the respondents, were not called on.

VISCOUNT HALDANE L.C. My Lords, this appeal raises a question of practice under the Arbitration Act of 1889.

The appellant is a timber merchant carrying on business at Liverpool, who was appointed an arbitrator under a submission. The respondents are timber merchants carrying on business in London, who were parties to the contract under which the submission was made. The other parties to the contract were the Standard Export Lumber Company, a company incorporated

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all the parties do not after differences have arisen concur in the appointment of an arbitrator:

. . . . .

"(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

. . . . .

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

Sect. 20. "Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just."

under American law and carrying on business abroad. A dispute arose between the American company and the respondent company as to some timber. There was a submission to arbitration made and arbitrators were appointed; the appellant was one and another gentleman was the other; and it appears that the two arbitrators were unable to agree upon the appointment of an umpire. That being so, the provisions of the Arbitration Act were invoked.

My Lords, the Arbitration Act was passed in order to give the Court, in references which come within its terms, certain powers which the Court did not possess before the date of the passing of the Act. It provides under s. 5 that, "Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, ... any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint . . . . an umpire or third arbitrator. If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an . . . . umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties." There is also in the Act a general provision, s. 20, that "Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just."

Now upon that Act the question which has arisen is what is the proper practice. I think the Act was intended to create a statutory jurisdiction of its own of the most elastic kind. It was meant to enable the Court to get before it anybody whom it might be proper to bring before it; and for that purpose it is provided in s. 5, in the words which I have read, that notice may be given to the arbitrators if it is thought right to do so. That obviously refers to the fact that when a submission has been completely entered into and the arbitrators appointed, the arbitrators may be the only persons to appoint the umpire; the parties may have nothing whatever to do with the appointment of the umpire. In such a case it would seem right that the Court, which is to take the place of the arbitrators who cannot agree, should have at least the opportunity of bringing the arbitrators before it and ascertaining their views before making the appointment.

My Lords, it seems to me that the true view of the Act is not that it was intended to create " a cause of action," to use an unfortunate expression, as I think, which occurs in Vaughan Williams L.J.'s judgment. I think the Act was intended to give power to the Court to get the necessary parties before it. It may be that that may be done by mere notice; it may be that it is proper in certain cases where there is the difficulty, as there was in this case, of one of the parties being abroad, to do it by summons. In any case great care should be taken as to the costs of the arbitrators. There is power, as I pointed out, to do that under s. 20 of the Act, and in any event the jurisdiction of the Court even apart from that section would have enabled it to impose terms upon bringing the arbitrators before it. It may be that in an ordinary case there is some other way, as for instance serving notice, which would enable the Court to bring the arbitrators before it and then, if they will not come, to compel them by subpœna to appear. I do not enter into that because all I wish to make clear is that in my opinion under the language of s. 5 it was contemplated that, quacunque via, the Court should have the opportunity of bringing the arbitrators before it, and that in certain cases (and I think this was one) the arbitrators were the proper persons to be brought before the Court, rather than the other party to the contract. I do not say there may not have been questions in this arbitration which rendered it proper to bring in the Standard Export Lumber Company, which was abroad, if it chose to come. Provision was made for that in the order which was ultimately made. But whether that was so or not, it seems to me that common sense and the language of the statute alike point to this, that the proper persons for the Court to have before it were the arbitrators who were making the difficulty about appointing an umpire. That being so, the question of substance is disposed of. What ought to be the practice in cases of this kind must be determined in accordance with the principles which I have indicated; I have no doubt as to the competence of the Court to work them out.

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In the result I have come to substantially the same conclusion as Buckley L.J. and Kennedy L.J., and I do not share the doubt which occurred to Vaughan Williams L.J. and which has led to this appeal being brought. I have therefore to move your Lordships that the appeal be dismissed with costs.

EARL OF HALSBURY. My Lords, I am of the same opinion. I confess, having had something to do with the Arbitration Act, I am a little appalled at the notion that proceedings of this sort should be made the subject of litigation again, so that the question of the tribunal, which is supposed to be settled by the parties originally, could be made itself the subject of litigation afterwards, and that an actual trial should be held, as it were, to determine whether one sort of arbitration or another sort of arbitration should be selected. That is not the contemplation of the statute at all. I entirely agree with the judgment which has been delivered.

LORD ASHBOURNE. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

Appeal dismissed with costs.

Lords' Journals, June 21, 1912.

Solicitors for appellant: *Trinder, Capron & Co.*
Solicitors for respondents: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, LIMITED . APPELLANTS;

AND

UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED . . . RESPONDENTS.

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Damages—Breach of Contract—Sale of Goods—Goods not according to Contract—Measure of Damages—Profit accruing from Act done in mitigation of Damages—Relevancy—Arbitration—Appeal—Jurisdiction—Consultative Opinion of High Court on Special Case—Award incorporating Opinion—Setting aside—Error on Face of Award.

Although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award.

Turbines supplied under a contract to a railway company were deficient in power and in economy of working and were not in accordance with the contract. The railway company, whilst reserving their right to damages for breach of contract, used the turbines for a time, but ultimately replaced them by other turbines of a different make and design. In the course of an arbitration between the contractors and the railway company as to the measure of damages in respect of the breach of contract the arbitrator found (1.) that the purchase of the substituted turbines by the railway company was a reasonable and prudent course for the purpose of mitigating the damages; (2.) that, even if the original turbines had complied with the contract, it would still have been to the pecuniary advantage of the railway company at their own cost to have replaced them by the other turbines owing to their greater efficiency; and he stated a special case for the opinion of the Court whether in the circumstances the cost of the substituted turbines was recoverable by the railway company as part of their damages. The Court answered this question in the affirmative, and the arbitrator made an award expressed to be made on the footing of this answer. A motion to set aside the award as containing an error of law on the face of it was refused, and this refusal was affirmed by the Court of Appeal:—

Held, (1.) that the Court had jurisdiction to set aside the award;

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* *Present:* VISCOUNT HALDANE L.C., LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

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(2.) that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines was relevant matter for the consideration of the arbitrator in assessing the damages, and that the award ought to be remitted to him with a declaration to that effect.

Decision of the Court of Appeal [1912] 3 K. B. 128, reversed.

Appeal from an order of the Court of Appeal affirming an order of the King's Bench Division. (1)

By a contract under seal dated March 12, 1902, and made between the Metropolitan District Electric Traction Company, Limited, of the one part and the appellants of the other part, the appellants agreed to provide, deliver, and erect in accordance with the specification annexed to the contract eight steam turbines and eight turbo alternators combined at the price of 250,000*l.* payable in instalments as therein provided. By a subsequent agreement another specification was substituted for the specification originally annexed to the contract. As from April 25, 1902, the respondents became entitled to the benefit and subject to the liabilities of the contract, and the appellants accepted the respondents in substitution for the Metropolitan District Electric Traction Company.

Clause 20 of the contract provided that every difference or dispute as to the meaning or effect of the contract and specification or in any way arising out of the same should be referred to arbitration under the provisions of the Arbitration Act, 1889.

At various dates during the years 1904, 1905, and 1906 the appellants provided, delivered, and erected the eight machines mentioned in the contract. These machines were defective in design and efficiency, and, in particular, they failed to satisfy the provisions of the contract with respect to economy, and their steam consumption was extravagant and materially exceeded that which the appellants guaranteed by the contract. The respondents nevertheless accepted the machines and used them for the purposes of their railway, reserving always their right to damages in respect of the said breaches on the part of the appellants of the terms of the contract. In the year 1907 the appellants, with the respondents' consent, removed one of the machines from the respondents' premises and endeavoured by making alterations

(1) [1912] 3 K. B. 128.

and improvements therein to bring it into conformity with the terms of the contract, and if their endeavours had proved successful they intended to effect similar alterations and improvements in the other seven machines. The respondents, always reserving their rights as aforesaid, acquiesced in the appellants making experiments on the said machine. After experiments extending over many months the appellants failed to bring the machine into conformity with the contract. The respondents thereupon determined to replace the machines provided by the appellants by others, and they purchased machines of a different design and manufacture, hereinafter called Parsons machines, and substituted them for the machines provided by the appellants. The Parsons machines had a greater capacity and a much smaller steam consumption than the appellants' machines, even supposing that the latter had been in conformity with the contract. Disputes having arisen under the contract of March 12, 1902, these disputes were by an agreement dated November 21, 1908, referred to the final determination of a sole arbitrator. In the arbitration the appellants claimed the sum of 83,293*l.*, the balance of the contract price of the machines supplied by them. The respondents counterclaimed for 280,987*l.* odd, the estimated loss caused by the excess in coal consumption for a period of twenty years, the estimated life of the appellants' machines, and alternatively for 78,186*l.*, the cost of installing the Parsons machines, and for a sum of approximately 42,000*l.*, the estimated loss caused by the excess in coal consumption during the time the appellants' machines were working. The first alternative was not pressed at the hearing. The arbitrator, before making his award, stated a special case for the opinion of the Court under s. 19 of the Arbitration Act. After finding that the appellants' machines were defective in the particulars above stated, he stated, as a matter about which there was no serious controversy, that the damages flowing from the said breaches of the contract appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expense of labour and of the disposal of ashes respectively caused by the defects existing in the appellants' machines, but subject to a deduction of the extra cost incurred

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under each of those heads by reason of certain defects in the condensing apparatus which the respondents were bound under the contract to provide. He then stated that it was contended by the respondents that they were further entitled to recover from the appellants the cost of the purchase and installation of the Parsons machines.

He then found the facts relative to this issue. He found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the defective machines in the future. He further found that the purchase of the Parsons machines was to the pecuniary advantage of the respondents, and that the superiority of the Parsons machines in efficiency and economy over those supplied by the appellants was so great that even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the contract it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied by the appellants by Parsons machines so soon as the latter were to be obtained.

He then set out the contentions of the parties as follows:—

Paragraph 17. "The contention of the claimants" (the appellants) "in substance was that having regard to the above facts I was entitled to draw the inference that the 'commercial life' of the claimants' machines had expired at the date of the purchase by the respondents of the Parsons machines, and that the said facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim and that accordingly no further damages of any kind were recoverable from them by the respondents after the date when Parsons machines were procurable by the latter; and further that the cost of procuring and installing Parsons machines was not recoverable by the respondents from the claimants."

Paragraph 18. "The respondents on the other hand contended that the cost of the purchase and installation of the Parsons machines is recoverable by them from the claimants as being the necessary cost and expense incurred by the respondents in mitigating or preventing (as from the respective dates when a Parsons machine was substituted for each of the claimants' machines) the damages which they would otherwise have been entitled to recover from the claimants."

The questions of law submitted for the opinion of the Court were :—

1. Whether the contention of the appellants above set forth in paragraph 17 of the case was well founded.

2. If not, whether the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the appellants as part of the respondents' damages.

The questions raised by the special case were argued before a Divisional Court consisting of the Lord Chief Justice and Hamilton and Avory JJ. (1) The Court adjudged that the contention of the appellants was not well founded and that the contention of the respondents on the facts as stated was correct. The arbitrator made his award whereby, after stating that he had adopted and acted upon the answers given by the Court to the questions submitted in the special case, he awarded that the appellants were not entitled to recover anything from the respondents in respect of their claim, and that the respondents were entitled to recover the sum of 15,394*l.* in respect of their counter-claim. A copy of the special case and the answers of the Court was annexed to the award and made to form part thereof. The appellants then applied to a Divisional Court consisting of Pickford and Lush JJ. to set aside the award or remit it back to the arbitrator for reconsideration upon the ground that the answers given by the Divisional Court to the questions submitted by the special case were wrong in law and constituted a misdirection to the arbitrator, and there was therefore an error of law on the face of the award. The Court, considering itself bound by the opinions given by the Divisional Court, dismissed the application without argument. The appellants appealed to the Court of Appeal (Vaughan Williams, Buckley, and Kennedy L.JJ.). (2) The Court held, first, (Vaughan Williams L.J. dissenting) that it was competent for them to entertain the appeal, and, secondly,

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(1) [1911] 1 K. B. 575.

(2) [1912] 3 K. B. 128.

(Buckley L.J. dissenting) that the appeal failed on the merits. Buckley L.J. differed upon the construction of the special case. As he read the findings of the arbitrator they amounted to a statement that the reasonableness and prudence of the course taken by the respondents were attributable not only to the position in which they found themselves by the breach of contract, but also to a regard for their own pecuniary advantage, and he thought that the appellants were entitled to a decision of the arbitrator upon the first point apart from the second; but except upon the question of construction he did not differ from the conclusions of the other members of the Court.

June 21, 25, 27, 28; July 1. *Sir Alfred Cripps, K.C.*, and *W. J. Disturnal* (with them *R. T. Tangye*), for the appellants. The appellants having failed to supply machines in conformity with the contract, the question is how are the damages for the breach of contract to be ascertained. The appellants' machines have been rejected and scrapped because they became obsolete, and they have been replaced by the Parsons machines. The arbitrator has found that, assuming that the appellants' machines had been according to contract, it would still have paid the respondents to have scrapped them and to have put the Parsons machines in their place. In ascertaining the measure of damages the true principle is that the person suffering from the breach of contract is to be placed in the same position as if there had been no breach. It may be that he has suffered no material loss. It is said by the respondents that, supposing it was a prudent thing to have purchased the substituted machines, they are entitled as part of the damages to the whole cost of those machines irrespective of the advantage which they have derived from them. But the money spent in purchasing the Parsons machines must have been spent if the appellants' machines had been absolutely in accordance with the contract, and the result of the award is that the appellants have paid for the Parsons machines. The appellants contend, first, that they are not liable for the cost of the Parsons machines because the purchase of those machines was not the consequence of any defect in the appellants' machines, but arose from other considerations; secondly, that,

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assuming that the purchase of these machines is to be attributed to the appellants' breach of contract, the Court will consider the true cost to the respondents in connection with that purchase, which is not merely the purchase price, but is the cost with all the counterbalancing advantages derived from those machines—greater power and greater economy. The respondents are entitled to an indemnity against loss in respect of the breach complained of, but they are not entitled to make a profit out of the transaction: *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1); *Wertheim* v. *Chicoutimi Pulp Co.* (2); *Wigsell* v. *School for Indigent Blind* (3); *Hochster* v. *De la Tour* (4); *Brace* v. *Calder* (5); *Oldershaw* v. *Holt.* (6) In *Joyner* v. *Weeks* (7), which was an action for damages for breach of a repairing covenant, the same principle was stated by Wright J., but his decision was reversed by the Court of Appeal on grounds of convenience. But that case is distinguishable. When once the Court has arrived at the conclusion that the measure of damages is x, which in that particular class of case was the cost of putting the premises into repair, no outside circumstances will be taken into consideration for the purpose of reducing x to $x - a$. But here the measure of damages never was x, but was $x - a$, that is to say, the price of the new machines less the value of the additional advantages derived from their use. Upon the question of jurisdiction it is true that the opinion of the Divisional Court is not directly appealable because it is a mere direction, but where there is an error of law on the face of an award the award is appealable, and not the less because the error of law is founded upon the opinion of the Divisional Court.

The Hon. J. D. Fitzgerald, K.C., and *Roskill, K.C.* (with them *Lynden Macassey*), for the respondents. 1. The opinion given by the Divisional Court upon the special case was right. It is the duty of a person suffering from a breach of contract to minimize the loss, and if that can be effected by the expenditure of a smaller sum of money that expenditure is the measure of

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(1) [1911] A. C. 105.
(2) [1911] A. C. 301, at p. 308.
(3) (1882) 8 Q. B. D. 357, at p. 364.
(4) (1853) 2 E. & B. 678; 22 L. J. (Q.B.) 455.
(5) [1895] 2 Q. B. 253, at p. 261.
(6) (1840) 12 Ad. & E. 590.
(7) [1891] 2 Q. B. 31.

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damages. There is no finding that the appellants' machines were obsolescent. Prima facie the amount of the continuing damage during the life of the inefficient machines is the measure of damage, or such smaller sum as by the purchase of other machines is necessary to bring that damage to an end. The respondents admit their duty to mitigate, and their contention is that the smallest expenditure necessarily incurred for that purpose plus the damage which had already accrued by the user of the defective machines is the measure of damages. The arbitrator has found that the expenditure on the new machines was reasonable and prudent, and, when money has been properly spent in mitigation of damages, any ancillary or incidental advantage arising from that expenditure does not come into account at all. It is said that the appellants' machines ought to have been scrapped in any event, and that consequently it is immaterial whether they were in accordance with the contract or not, because after the Parsons machines came into vogue they became commercially valueless. That argument would lead to this startling result, that the appellants could get payment in full for defective machines. The respondents' position is that being defective the machines are worth so much less than the contract price, and that that is a proper consideration for the arbitrator: *Mondel* v. *Steel.* (1) Upon the authorities, the respondents having adopted a prudent and reasonable course in purchasing the Parsons machines, they are entitled to recover the full cost of those machines without regard to any incidental advantages to be derived from their use: *Le Blanche* v. *London and North Western Ry. Co.* (2); *Joyner* v. *Weeks* (3); *Bradburn* v. *Great Western Ry. Co.* (4); *Jebsen* v. *East and West India Dock Co.* (5); *Rodocanachi* v. *Milburn.* (6) The measure of damages is the money which the person suffering from the breach has to pay to put an end to the damage. No case can be found in which the value of extraneous or incidental advantages arising from the proper expenditure of money in minimizing the loss in respect of a breach of contract has been brought in in reduction of damages, and it is difficult to see on what principle the deduction is to be made. [They also referred to *Hinde* v. *Liddell* (1); *The Mediana* (2); *Staniforth* v. *Lyall* (3); *Cobb* v. *Great Western Ry. Co.* (4); *The Greta Holme* (5); *Perrott* v. *Shearer* (6); *Norristown* v. *Moyer* (7); Sedgwick on Damages, p. 117.]

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(1) (1841) 8 M. & W. 858, at p. 871.

(2) (1876) 1 C. P. D. 286, at pp. 302, 313.

(3) [1891] 2 Q. B. 31.

(4) (1874) L. R. 10 Ex. 1.

(5) (1875) L. R. 10 C. P. 300.

(6) (1886) 18 Q. B. D. 67.

2. An opinion given by the Court in its consultative capacity to an arbitrator cannot be the subject of an appeal directly or indirectly; and if the arbitrator has acted on that opinion and it is wrong, that does not constitute an error of law on the face of the award which will justify the setting aside of the award: *In re Knight and Tabernacle Permanent Building Society.* (8)

[VISCOUNT HALDANE L.C. *Hodgkinson* v. *Fernie* (9) shews that an award can be set aside where there is a mistake of law apparent on the face of the award.]

The decision in that case was that the award was final. In *Adams* v. *Great North of Scotland Ry. Co.* (10) Lord Halsbury quoted with approval the decision of the Court of Common Pleas in *Emmerson* v. *Stimpson* (11) that the decision of an arbitrator was final on a question of law as well as on a question of fact, and in *Great Western Ry. Co.* v. *S. Pearson & Son, Ld.* (12) he threw doubt on the proposition of law stated in *Hodgkinson* v. *Fernie* (9) if it meant that any error of law apparent on the face of the award was a sufficient ground for setting it aside, although the decision in that case was that there was not in fact any error of law apparent on the face of the award. It is suggested that the general understanding of the profession on this point is erroneous and that an award is not appealable for any error of law except where the final award is stated in the form of a special case. There is no case which says an award is appealable where the only error of law apparent on the face of the award consists in following an erroneous opinion of the Court given in answer to a question submitted by the arbitrator in the course of the arbitration. [They also cited on this point *S. Pearson & Son, Ld.* v. *Great Western Ry. Co.* (1)]

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(1) (1875) L. R. 10 Q. B. 265, at p. 270.

(2) [1900] A. C. 113, at p. 117.

(3) (1830) 7 Bing. 169.

(4) [1893] 1 Q. B. 459.

(5) [1897] A. C. 596.

(6) (1868) 17 Mich. 48.

(7) (1871) 67 Pa. 355.

(8) [1892] 2 Q. B. 613.

(9) (1857) 3 C. B. (N.S.) 189.

(10) [1891] A. C. 31.

(11) (1847) 9 L. T. (O.S.) 199.

(12) (H. L.) October 29, 1907. Unreported.

Disturnal in reply. *Hodgkinson* v. *Fernie* (2) was recognized and acted upon in *Landauer* v. *Asser* (3) and it follows *Kent* v. *Elstob.* (4)

The House took time for consideration.

July 19. Viscount Haldane L.C. My Lords, the question raised in this appeal relates to the measure of damages payable by the appellants to the respondents on account of a breach of contract by the appellants. The contract, which was made in 1902, bound the appellants to deliver and erect within a period and in accordance with a specification eight steam turbines of 5500 kilowatt capacity and eight turbo alternators. Some alterations were afterwards by agreement made in the specification, but it is not necessary to refer to these. The price was to be 250,000*l.* payable in instalments. The contract provided for reference of disputes as to its meaning or effect to arbitration, and, in the events which happened, the Right Hon. Alfred Lyttelton was appointed arbitrator. The Arbitration Act of 1889 applied to the reference.

Differences arose between the parties. The appellants at various dates during the years 1904, 1905, and 1906 provided the machines, but the respondents alleged that the machines provided failed to satisfy the provisions of the contract with respect to economy and steam consumption. They claimed damages for the breach of contract to the extent of 280,000*l.* and upwards, which they said was their estimate of the loss caused by the excessive coal consumption for a period of twenty years at which they estimated the life of the machines. Alternatively they claimed the cost of installing eight new Parsons turbines, being machines of an improved order and of 6000 instead of 5500 kilowatt capacity, which they had purchased elsewhere when the appellants' machines proved insufficient. The cost of these machines they estimated at 78,186*l.* 4*s.*, and they claimed in addition 42,000*l.* for the estimated loss caused by the excess of coal consumption during the time in which the appellants' machines were working and before the Parsons machines could be installed.

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(1) (H. L.) July 3, 1907. Unreported.

(2) 3 C. B. (N.S.) 189.

(3) [1905] 2 K. B. 184.

(4) (1802) 3 East, 18.

It appeared that after the appellants' machines were installed they supplied power for several years, but in a manner which was defective. The respondents, however, used them, and allowed the appellants to remove one temporarily, in order to endeavour to improve it, but the respondents always reserved their right to damages on account of breach of contract. It was not until 1908 that the respondents came to the conclusion that they would replace the appellants' machines with the Parsons machines.

The arbitrator heard the parties on the dispute which had arisen between them, and on June 14, 1910, stated a special case. He set out that the claim of the appellants was in substance for the unpaid balance of the price of their machines and that as against this claim the respondents counterclaimed the larger sums to which I have already referred, as damages. The counter-claim, he said, was made originally in alternative ways. First, upon the footing of the loss and damage already caused to the respondents, and of the loss which would afterwards have been caused to them by reason of the appellants' breach of contract on the assumption that the respondents had continued to make use of the appellants' machines. Alternatively the respondents had claimed a smaller sum, composed of the damages already caused to them plus the cost to them of the installation of the Parsons machines. He stated that the damages flowing from the breaches of the contract by the appellants appeared to be measurable in the first instance by a sum representing the cost of the extra consumption of coal and the extra expenses of labour, and arising in connection with the disposal of ashes caused by the defects in the machines delivered, but subject to certain deductions by reason of defects in the condensing apparatus which the respondents themselves had undertaken to provide. He stated that in addition to this head of claim, about which there was no serious controversy, the respondents further contended that they were entitled to recover the cost of putting in the Parsons machines, alleging that by so doing further loss had been prevented which must otherwise have fallen on the appellants in respect of the prospective loss from extra consumption of coal and other matters, to be caused by the use of the defective machines. He then found as a fact that the purchase of the Parsons machines by the respondents was a reasonable and prudent course, and that it mitigated or prevented the loss and damage which would have been recoverable from the appellants if the respondents had continued to use the appellants' defective machines in the future.

He found further that the purchase of the Parsons machines was to the pecuniary advantage of the respondents and that the superiority of Parsons machines in efficiency and economy over those supplied by the appellants was so great that, even if the appellants had delivered to the respondents machines in all respects complying with the conditions of the said contract, it would yet have been to the pecuniary advantage of the respondents at their own cost to have replaced the machines supplied to the respondents by Parsons machines so soon as the latter could be obtained.

Having found these facts, he set out the contentions of the parties. The case of the appellants was in substance that on the facts as stated he was entitled to draw the inference that the "commercial life" of these machines had expired at the date of the purchase by the respondents of Parsons machines, that these facts were therefore relevant to the question of the amount of damages recoverable on the counter-claim, and that accordingly no further damages of any kind were recoverable by the respondents after the date when they could procure Parsons machines, and, further, that the cost of procuring and installing Parsons machines was not recoverable by the respondents.

The contention of the respondents on the other hand was that the cost of the purchase and installation of the Parsons machines was recoverable by them from the appellants as being the necessary cost and expense incurred by the respondents in mitigating, as from the respective dates when a Parsons machine was substituted for each of the appellants' machines, the damages which they would have been entitled to recover from the appellants.

The arbitrator then stated, under the powers conferred by the Arbitration Act, 1889, two questions of law for the opinion of the Court. The first was whether the contention of the appellants as above set out was well founded, and the second was whether, if that was not so, the respondents were right in their contention that the cost to them of the purchase and installation of the Parsons machines was recoverable by them from the appellants as part of their damages.

These facts came before the Lord Chief Justice and Hamilton and Avory JJ. sitting as a Divisional Court, and judgment was given to the effect that the contention of the appellants referred to in question 1 was not well founded, and that the contention of the respondents referred to in question 2 was right.

The judgments proceeded on the footing that advantages had accrued to the respondents from the superiority of the Parsons machines and the economy resulting thereby, but that the appellants were not entitled to have the pecuniary advantages so arising taken into account. The cost of purchasing the Parsons machines was properly incurred, and was the best course the respondents could take in the interest of the appellants as well as of themselves, and they were entitled to recover it. But what profit they had made by their subsequent use related to transactions unconnected with the contract, and the respondents could not be called upon to bring this profit into account.

On these answers by the Court to the questions submitted to them being brought before the arbitrator, he made his award on February 23, 1911, and, acting on the answers, awarded that the appellants were not entitled to recover anything from the respondents, but that the respondents, on the other hand, were entitled to succeed in their counter-claim to the extent of a sum which he ascertained, on the basis of the decision of the Court, at 15,394*l.* He arrived at this balance by allowing the respondents certain sums which they had to pay, during the time when they used the appellants' machines, for extra coal consumption and labour due to the defects in these machines, which sums are not in dispute, and by crediting the respondents with the cost of obtaining and installing the Parsons machines.

The appellants made a motion in the King's Bench Division to set aside the award on the ground that it was bad as containing an error in law on the face of it. But the Court, considering that it was bound by the opinions previously given by the Divisional Court, dismissed the motion.

Against this order the appellants appealed to the Court of Appeal. Two questions arose. One of these was whether it was competent to the Court of Appeal to review the opinions given by the Divisional Court to the arbitrator. It was argued for the respondents that, as the opinions given under the Arbitration Act by the Divisional Court were not and could not be appealed, the Court of Appeal could not review them and was bound by the law as so stated.

On this point Vaughan Williams L.J. considered that the respondents were right. Buckley and Kennedy L.JJ. took a different view.

My Lords, I cannot say that I entertain any doubt that the view taken by the majority in the Court of Appeal on this question was the correct one. No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But, in my opinion, that is the only reason why it cannot be appealed, and if the law embodied in it is afterwards set out on the face of a final award, I see no reason for thinking with Vaughan Williams L.J. that the Act intended to make the statement of the law appearing on the face of the award binding on a higher tribunal before which the award might come for review.

It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (1) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (1), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do

(1) 3 C. B. (N.S.) 189.

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not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *In re Knight and The Tabernacle Permanent Building Society* (1) is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award.

The question thus arising was decided by the majority in the Court of Appeal in favour of the respondents. They held that the law as to the measure of damages had been rightly laid down by the Divisional Court. They thought that the purchase of the Parsons machines must be taken to have been merely for the purpose of mitigating the damages, and that the appellants were not entitled to have the pecuniary advantages arising from the subsequent use of these much superior machines, and the saving of working expenses which would have been incurred even had the appellants' machines been up to the standard of efficiency contracted for, brought into account.

Vaughan Williams and Kennedy L.JJ. held that the action of the respondents in purchasing the new machines had given them advantages in the conduct of their business subsequent to the breach of which the appellants were not entitled to claim the benefit. Buckley L.J. on the other hand thought that the appellants were entitled to have a decision from the arbitrator as to whether the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage, and, if so whether it was the only reasonable and prudent course which they could take to mitigate the damages, or whether, for instance, they could have bought Parsons machines, not of 6000 kilowatts as in fact they did, but of 5500 kilowatts, which was the standard of efficiency under the contract, with a length of life no greater than that of the discarded machines. On this point Buckley L.J. considered that the appellants had had no decision from the arbitrator and were entitled to it.

Upon the question which I have stated I am unable to agree with the majority of the Court of Appeal. For reasons which will

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(1) [1892] 2 Q. B. 613.

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appear I do not wholly agree with the view taken by Buckley L.J. Dissenting from the majority, he still thought that the first question raised by the special case could not be answered in the appellants' favour unless the arbitrator should first find that the purchase of the new machines was reasonable and prudent for the purpose of mitigating the damages, apart from its prudence for their own pecuniary advantage. I think that the sequence of events and the facts actually found by the arbitrator obviate the necessity of his separately deciding this point. It was, in my opinion, really disposed of by his finding.

The arbitrator appears to me to have found clearly that the effect of the superiority of the Parsons machines and of their efficiency in reducing working expenses was in point of fact such that all loss was extinguished, and that actually the respondents made a profit by the course they took. They were doubtless not bound to purchase machines of a greater kilowatt power than those originally contracted for, but they in fact took the wise course in the circumstances of doing so, with pecuniary advantage to themselves. They had, moreover, used the appellants' machines for several years, and had recovered compensation for the loss incurred by reason of these machines not being during these years up to the standard required by the contract. After that period the arbitrator found that it was reasonable and prudent to take the course they actually did in purchasing the more powerful machines, and that all the remaining loss and damages was thereby wiped out.

In order to come to a conclusion on the question as to damages thus raised, it is essential to bear in mind certain propositions which I think are well established. In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonize. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.

Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (1), "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

Staniforth v. *Lyall* (2) illustrates this rule. In that case the defendants had chartered a ship to New Zealand, where they were to load her, or by an agent there to give the plaintiff, the owner, notice that they abandoned the adventure, in which case they were to pay 500*l.* The ship went to New Zealand, but found neither agent nor cargo there, and the captain chose to make a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original venture to New Zealand would have been. The Court of Common Pleas decided that the action was to be viewed as one for a breach of contract to put the cargo on board the plaintiff's vessel for which the plaintiff was entitled to recover all the damages he had incurred, but that he was bound to bring into account, in ascertaining the damages arising from the breach, the advantages which had accrued to him because of the course which he had chosen to adopt.

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(1) (1878) 9 Ch. D. 20, at p. 25.

(2) 7 Bing. 169.

I think that this decision illustrates a principle which has been recognized in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage.

Recent illustrations of the way in which this principle has been applied, and the facts have been allowed to speak for themselves, are to be found in the decisions of the Judicial Committee of the Privy Council in *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1) and *Wertheim* v. *Chicoutimi Pulp Co.* (2) The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class illustrated by *Bradburn* v. *Great Western Ry. Co.* (3), where it was held that, in an action for injuries caused by the defendants' negligence, a sum received by the plaintiff on a policy for insurance against accident could not be taken into account in reduction of damages. The reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant, which gave the plaintiff his advantage. Again, it has been held that, in an action for delay in discharging a ship of the plaintiffs' whereby they lost their passengers whom they had contracted to carry, the damages ought not to be reduced by reason of the

(1) [1911] A. C. 105.
(2) [1911] A. C. 301.
(3) L. R. 10 Ex. 1.

same persons taking passage in another vessel belonging to the plaintiffs: *Jebsen* v. *East and West India Dock Co.* (1), a case in which what was relied on as mitigation did not arise out of the transactions the subject-matter of the contract.

The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair illustrate yet another class of authorities in which the qualifying rule has been excluded. In *Joyner* v. *Weeks* (2) the lessor had made a lease to another lessee by way of anticipation, to commence from the expiration of the term of this lease, and the new lessee had made no claim to be reimbursed the cost which he had incurred in repairing after the expiration of the demised lease. Wright J. held that the true test was the amount of diminution in value to the lessor, not exceeding the cost of doing the repairs. The Court of Appeal, including Lord Esher and Fry L.J., took a different view. They thought that there had been a constant practice of laying down the measure of damages as being the cost of putting into repair, and that in the particular class of cases with which they were dealing it was a highly convenient rule which ought not to be disturbed. Any other measure appeared to involve complicated inquiries. Moreover, the arrangement between the lessor and the new lessee was res inter alios acta with which the original lessee had nothing to do and which he was not entitled to set up.

I think the principle which applies here is that which makes it right for the jury or arbitrator to look at what actually happened, and to balance loss and gain. The transaction was not res inter alios acta, but one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach. Apart from the breach of contract, the lapse of time had rendered the appellants' machines obsolete, and men of business would be doing the only thing they could properly do in replacing them with new and up-to-date machines.

The arbitrator does not in his finding of fact lay any stress on the increase in kilowatt power of the new machines, and I think that the proper inference is that such increase was regarded by

(1) L. R. 10 C. P. 300.

(2) [1891] 2 Q. B. 31.

him as a natural and prudent course followed by those whose object was to avoid further loss, and that it formed part of a continuous dealing with the situation in which they found themselves, and was not an independent or disconnected transaction.

For the reasons I have given I think that the questions of law stated by the arbitrator in the special case have been wrongly answered by the Courts below. The result is that the award cannot stand and must be sent back to the arbitrator, with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages was right, and that of the respondents on the second question was wrong. The appellants are entitled to their costs here and in the Court of Appeal, and of the proceedings in the Divisional Court on the motion to set aside the award.

I move accordingly.

Lord Ashbourne. My Lords, I agree.

Lord Macnaghten. My Lords, I agree.

Lord Atkinson. My Lords, I concur.

Order of the Court of Appeal reversed and award remitted to the arbitrator, with a declaration that the contention of the appellants on the first question so far, but only so far, as they contended that the several facts relied upon by them were relevant matter to be considered by the arbitrator in assessing the damages was right, and that the contention of the respondents on the second question was wrong. The respondents to pay the costs in the Court of Appeal and of the appeal to this House and of the motion in the King's Bench Division to set aside the award.

Lords' Journals, July 19, 1912.

Solicitors for appellants: *Faithfull & Owen.*
Solicitors for respondents: *Bircham & Co.*

[HOUSE OF LORDS.]

WATKINS . . . . APPELLANT;

AND

NAVAL COLLIERY COMPANY (1897), LIMITED RESPONDENTS.

H. L. (E.)*

1912

July 19.

Master and Servant—Negligence—Mine Owner—Breach of Statutory Duty—Obligation to provide proper Raising and Lowering Apparatus—Fatal Accident—Coal Mines Regulation Act, 1887 (50 *&* 51 *Vict. c.* 58), *s.* 16; *s.* 49, *r.* 30.

Sect. 16, sub-s. 1, of the Coal Mines Regulation Act, 1887, provides that the owner of a mine shall not employ any person in the mine or permit any person to be in the mine for the purpose of employment unless, among other conditions respecting shafts, the following condition is complied with: Proper apparatus for raising and lowering persons at each shaft shall be kept on the works belonging to the mine and shall be constantly available for use.

A workman employed in a coal mine, whilst being lowered with twenty-five other workmen in a cage worked by a winding engine, was killed by an accident. Two months before the accident the manager of the mine had directed that the number of men to be lowered in the cage should be increased from twenty to twenty-six and had exhibited this direction on a notice board in accordance with the special rules (made under s. 51 of the Coal Mines Regulation Act, 1887) to be observed at the mine. The widow of the deceased brought an action against the mine owners under the Fatal Accidents Act, 1846, in respect of the death of her husband and founded her claim on the breach by the defendants of their statutory duty under the Coal Mines Regulation Act, 1887, and alternatively on negligence. The jury found that the accident was caused by the combined effect of the inadequacy of the brake attached to the winding engine and the defective condition of a spanner bar used in connection with the reversing gear of the winding engine; that the inadequacy of the brake (which they found was adequate for lowering twenty men) was due to the negligence of the manager in authorizing twenty-six men to be lowered in the cage, and that the defective condition of the spanner bar was due to the negligence of the defendants' mechanical engineer; but that neither was due to the negligence of the defendants. On these findings Pickford J. gave judgment for the plaintiff, on the ground that r. 30 of s. 49 of the Coal Mines Regulation Act, 1887, imposed an unqualified obligation on the defendants to attach to the lowering apparatus a brake adequate for the ordinary working of the mine as prescribed at the time of the accident, but this decision was reversed by the Court of Appeal:—

Held, that s. 16, sub-s. 1, imposed an absolute obligation on the mine

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* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, LORD MACNAGHTEN, and LORD ATKINSON.

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owner to provide proper apparatus for lowering persons employed at the mine and that the plaintiff was entitled to judgment on that ground.

Per Viscount Haldane L.C.: He was not to be understood as dissenting from the view of Pickford J. as to the effect of r. 30 of s. 49.

Decision of the Court of Appeal [1911] 2 K. B. 162, reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Pickford J. (1)

The action was brought under the Fatal Accidents Act, 1846, by the appellant, the widow of a workman named Albert Watkins, on behalf of herself and her six children, for damages in respect of the death of her husband, who at the time of his death was working as a miner at the respondents' colliery.

Watkins was one of twenty-six workmen who on August 27, 1909, were being lowered down a coal pit in a cage provided by the respondents. The cage descended violently to the bottom of the pit, causing the ascending cage to go up violently, break loose from the rope to which it was attached, and fall down the shaft on the top of the other cage, which had then reached the bottom, with the result that Watkins and six of the other occupants were killed and all the others were seriously injured. On the occasion in question the reversing gear of the winding engine which worked the cage suddenly broke down owing to the snapping of a spanner bar, which was defective, and the brake being inadequate to hold the load of twenty-six men at the time being lowered in the cage, the cage fell.

Until June, 1909, this cage had been used for lowering and raising a load not exceeding twenty men at a time, but in that month one Hollister, who had recently become manager of the colliery, increased the number of men authorized to be lowered or raised at one time to twenty-six, and he put up a notice to that effect on a notice board at the head of the pit in accordance with the requirements of rule 6 of the special rules in force at the colliery. (2)

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(1) [1911] 2 K. B. 162.

(2) The special rules (made under s. 51 of the Coal Mines Regulation Act, 1887) to be observed at the colliery provided under the heading "Manager," so far as material, as follows:

"The following rules are obligatory upon and must be obeyed by the manager of the colliery:—

"5. He must provide fit and adequate machinery and structures

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The action was founded on the breach by the respondents of their statutory duty under the Coal Mines Regulation Act, 1887, and alternatively on negligence. The appellant delivered particulars of both heads of claim. The particulars of breaches of statutory duty stated, so far as material, as follows: "(H) The winding engine by means of which the said Albert Watkins was lowered into the said mine was a machine worked by steam and used for lowering and raising persons and there was not attached to it an adequate brake."

The respondents by their defence denied that the death was caused by any breach of statutory duty or negligence on their part and they set up the defence of common employment.

The action came on for trial before Pickford J. and a special jury at the Glamorganshire Assizes. The jury, in answer to a series of questions left to them by the learned judge (1), found (inter alia) that the brake, though adequate for lowering twenty men, was inadequate for lowering twenty-six men, and that the use of an inadequate brake was due to the negligence of the manager Hollister, but not of the respondents; that the spanner bar, though adequate for its purpose at the time when it was fitted, was not adequate for its purpose at the date of the accident, and that such inadequacy was due to the negligence of Dorman, the respondents' mechanical engineer, but not of the respondents; that by reason of the premises the winding machine at the date of the accident was not adequate to lower either twenty men or twenty-six men, and that this inadequacy was due to

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for the purpose of the colliery, and take care the same are kept in repair, and he must provide upon the premises of the colliery a sufficient quantity of materials for the purpose of carrying on the colliery with safety.

"6. He shall direct the number of persons to descend or ascend at the same time in a shaft or incline, and the number to descend or ascend in each compartment of a cage or carriage, and shall cause the direction specifying those numbers respectively to be legibly put up and maintained upon a notice board placed conspicuously on the surface near the shaft or incline head, and at each stage or landing from which persons descend or ascend a shaft or incline, and he shall cause the same direction and numbers to be recorded in a book at the colliery."

(1) The questions submitted to the jury and the answers thereto are fully set out in the previous report of the case [1911] 2 K. B. 162.

the negligence of the manager and the mechanical engineer, but not of the respondents; that it was negligence on the part of the manager but not of the respondents to authorize twenty-six men to be lowered at one time instead of twenty; that the accident was due to the inadequacy of the brake and to the defective condition of the spanner bar combined. They further found that the respondents had taken reasonable care to obtain competent officials, and that both the manager and the mechanical engineer were competent for the duties entrusted to them.

Upon these findings the learned judge reserved the case for further consideration.

On the further consideration of the action Pickford J. gave judgment for the appellant for 500*l.*, the agreed amount of the damages, upon the ground that r. 30 of the General Rules in s. 49 of the Coal Mines Regulation Act, 1887, imposed upon the mine owner an absolute obligation to provide an adequate brake for the ordinary working of the mine, and that that obligation varied with any alteration properly made in the ordinary method of working the mine.

The respondents appealed. The Court of Appeal (Vaughan Williams, Farwell, and Kennedy L.JJ.) reversed the decision of Pickford J. and held upon the authority of *Britannic Merthyr Coal Co.* v. *David* (1) that r. 30 did not impose upon the mine owner an unqualified obligation but only an obligation to provide such a brake as their expert manager should deem to be adequate, and that the defendants (the respondents) in the absence of any negligence on their part contributing to the accident were not liable.

1912. June 13, 14, 17. *Sir R. Finlay, K.C.*, and *Abel Thomas, K.C.* (with them *Albert Parsons*), for the appellant. This is primarily an action for damages in respect of a breach of statutory duty. The Coal Mines Regulation Act, 1887, imposes an absolute obligation on the mine owner to provide adequate brake accommodation for any apparatus for lowering or raising persons working in the mine: s. 16, sub-s. 1 (*c*); s. 49, r. 30. (2)

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(1) [1910] A. C. 74.

(2) The Coal Mines Regulation Act, 1887, provides:

Sect. 16, sub-s. 1: "After the commencement of this Act the owner agent or manager of a mine shall not employ any person in the mine, or permit any person to be in

"Adequate" means adequate for the number of men lowered or raised at the time of user. The act complained of here was not an isolated act of negligence. The manager increased the number of men to be carried in this cage from twenty to twenty-six, and this direction was duly exhibited on a notice board in accordance with the special rules made under s. 51 of the Act. Under s. 16, sub-s. 1 (*c*), the statutory obligation on the mine owner is not to allow persons to be employed in the mine without providing proper apparatus for lowering and raising the men. That is an absolute and unqualified obligation to provide proper lowering and raising apparatus for the use of the men employed at the mine, and "proper apparatus" of course implies that it shall be equipped with an adequate brake. That provision relates both to the construction and to the user of the apparatus; it is complete in itself and is sufficient to dispose of this case. Rule 30 of s. 49, which requires that every lowering and raising apparatus shall be furnished with an adequate brake, also imposes an absolute and unqualified obligation on the mine owner. It is true that s. 49 says that the general rules thereinafter set out

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the mine for the purpose of employment therein, unless the following conditions respecting shafts or outlets are complied with, that is to say,—

. . . . .

"(*c*) Proper apparatus for raising and lowering persons at each such shaft or outlet shall be kept on the works belonging to the mine; and such apparatus if not in actual use at the shafts or outlets, shall be constantly available for use."

Sub-s. 2: "Every owner agent and manager of a mine who acts in contravention of or fails to comply with this section shall be guilty of an offence against this Act."

Sect. 49: "The following general rules shall be observed, so far as is reasonably practicable, in every mine:

. . . . .

"Rule 30. There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break or breaks, ..."

Sect. 50: "Every person who contravenes or does not comply with any of the general rules in this Act, shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner agent and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

shall be observed "so far as is reasonably practicable," but in applying that qualification regard must be had to the nature of the rules. Certain of the rules (namely, rr. 6, 11, 15, 18, 30, 31) relate to construction, and as regards those that qualification cannot come into effect because they are all reasonably practicable. Others, on the contrary, relate, not to construction, but to working and management, and as regards those a limited company appointing competent subordinates would not be liable. Sect. 50 does not affect the question. The latter part of that section relates to breaches by persons other than the owner and renders the owner liable, but allows him to exonerate himself in the manner therein mentioned. That does not apply where, as in this case, the person guilty of the breach is the owner himself. Moreover, that section has reference to criminal liability. The special rules made under s. 51 do not relate to the owner and cannot limit the statutory obligation imposed on the owner himself by s. 16, sub-s. 1 (*c*), and s. 49, r. 30. It will be urged by the respondents that the act complained of in this action was a negligent act on the part of the manager and that, as he was a competent official, the respondents are not liable, but that view is erroneous and is really inconsistent with *Britannic Merthyr Coal Co.* v. *David.* (1) If a company by its superior officers commits a breach of statutory duty it is just as much liable as a private owner who had himself committed a breach would be. The decision of the Court of Appeal was founded upon a misapprehension of the effect of the decision of this House in *Britannic Merthyr Coal Co.* v. *David.* (1) So far as this action is founded upon breach of statutory duty the doctrine of common employment has no application: *Groves* v. *Lord Wimborne* (2); *Bett* v. *Dalmeny Oil Co., Ld.* (3); and see *Butler* v. *Fife Coal Co.* (4) Even as regards the common law claim for negligence the defence of common employment does not apply, because this is not a case of a fellow servant, but of the master himself being guilty of negligence. A company can only act by its officials, and the higher officials are not fellow servants with

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(1) [1910] A. C. 74.

(2) [1898] 2 Q. B. 402, at pp. 409, 410.

(3) (1905) 7 F. 787.

(4) Ante, p. 149, at p. 162.

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the injured man, but are the company itself. If it is shewn that the directors of a company are guilty of negligence, that is the negligence of the company. Any other conclusion would preclude a servant from ever recovering from a company for negligence. It is the duty of the employer at common law to provide adequate appliances, to maintain them in a proper condition, and to conduct his business in such a way as not to subject those employed by him to unnecessary risk; and that duty is not affected by the doctrine of common employment: *Smith* v. *Baker & Sons* (1); *Brydon* v. *Stewart* (2); *Bartonshill Coal Co.* v. *Reid.* (3) *Wilson* v. *Merry* (4), which decides that the law as to common employment is the same in Scotland as in England, does not affect this case.

Francis Williams, K.C., and *Atkin, K.C.* (with them *Trevor Lewis*), for the respondents. 1. It is not open to the appellant to rely upon the liability of the mine owner under s. 16. That point was not referred to in the particulars of breaches; it was not raised at the trial, and it was only raised incidentally in the Court of Appeal.

2. Sect. 16 does not impose upon the owner an absolute duty to provide proper apparatus. It imposes a negative duty not to employ persons in the mine unless proper apparatus is provided, but the positive duty to provide proper apparatus is imposed elsewhere by the statute. If the appellant's construction is correct, then, however morally blameless an owner may be, he cannot escape liability, for sub-s. 2 of s. 16 provides that any owner who fails to comply with the section shall be guilty of an offence against the Act, and the section contains no provision such as is found in s. 50 exonerating him if he does his best. The only obligation on the owner under s. 16 is to provide for the safety of the men by complying with the special and general rules, and then s. 50 applies. His duty is to appoint a competent manager and provide him with the means which the manager considers adequate for the safety of the men: *Baker* v. *Carter.* (5) Further, assuming that s. 16 imposes an absolute

(1) [1891] A. C. 325, at pp. 353, 362.

(2) (1855) 2 Macq. 30.

(3) (1858) 3 Macq. 266, at pp. 289, 290.

(4) (1868) L. R. 1 H. L. Sc. 326.

(5) (1878) 3 Ex. D. 132.

duty to provide proper apparatus, the respondents have discharged that obligation. If the owner has provided proper apparatus for lowering and raising the men, it would not be a breach of that duty if the manager abused that apparatus by sending down too many men. The duty of fixing the number of men was on the manager and not on the owner, and the cause of the accident was not that the apparatus was not proper, but that it was used in an improper manner by the negligence of the manager. The respondents were not parties to the notice prescribing the number of men to be sent down. They were not in a position to know how many men should occupy the cage and they had no means of interfering. The owner does not undertake to execute in person the work connected with the business, and the result of his personal interference, as Lord Cairns points out in *Wilson* v. *Merry* (1), might be disastrous instead of beneficial to his servants, for the owner may be an unskilled person.

Sir R. Finlay, K.C., replied.

The House took time for consideration.

July 19. VISCOUNT HALDANE L.C. My Lords, the action out of which this appeal arises was brought by the appellant under Lord Campbell's Act on behalf of herself and her infant children. The claim was based on breach of statutory duty by the respondents, who are a colliery company carrying on business subject to the provisions of the Coal Mines Regulation Act, 1887. It was also framed alternatively as an action at common law for negligence. It is agreed that the claim was not one which the Employers' Liability Act, 1880, covered.

The action was brought on account of a fatal accident which happened to Albert Watkins, the husband of the appellant, on August 27, 1909. He was one of twenty-six workmen who were being lowered on that day down a coal pit in a cage provided by the colliery company for the purpose. Until June, 1909, the cage in question had been used for lowering and raising a load not exceeding twenty men at a time, and for such a load the brake on the winding engine was adequate.

(1) L. R. 1 H. L. Sc. 326.

In June, 1909, Mr. Hollister, who had become manager of the colliery a short time previously, increased to twenty-six the number of men authorized to be lowered or raised at one time. On the occasion of the accident the reversing gear of the winding engine suddenly broke down owing to the snapping of the spanner bar, which was defective. The effect was to throw the whole strain on the brake, and the brake was inadequate to hold the load of twenty-six men who were being lowered. The cage descended violently to the bottom, causing the corresponding ascending cage to go up violently and to break loose from its winding rope and fall down the shaft on the top of the other cage. The result was that Albert Watkins and six more of the men were killed, and the rest were seriously injured.

The action was tried before Pickford J. and a special jury at the Glamorgan Assizes in March, 1910. The jury found that the respondents had used reasonable care in obtaining competent officials, and that the officials concerned were competent; that the brake was adequate for lowering twenty men, but not for lowering twenty-six; and that the use of an unfit or inadequate brake was due to the negligence of one of the officials of the respondents, Mr. Hollister, but not to the negligence of the respondents. They also found that the spanner bar was adequate for its purpose when it was fitted, but not at the time of the accident, and that this was due to the negligence of another of the officials of the respondents, Mr. Dorman, but not to their own negligence; and, further, that the winding engine was not, at the date of the accident, in a fit or adequate condition to lower twenty-six men, and that this was due to the defective condition of the brake and of the spanner bar, and to the negligence of officials of the respondents, but not of the respondents themselves.

It must be observed, in interpreting the verdict of no negligence on the part of the respondents, that in his summing up the learned judge who tried the case directed the jury as follows: "It is for you to answer. Can you say that a limited company can prove anything more to shew that they have taken proper care to see that their machinery is right than that they have appointed competent and proper persons to do it? I can see nothing else, and I have heard nothing else suggested. They have done that in this case. If you think that was all they could do, then they have shewn that they have taken reasonable and proper care to see that the brake was an adequate brake."

Pickford J. finally gave judgment for the plaintiff for 500*l*. He proceeded on the ground that s. 49, r. 30, of the Coal Mines Regulation Act, 1887, imposed an unqualified obligation on the respondents to attach to the lowering apparatus a brake adequate for the ordinary working of the mine as prescribed at the time of the accident, and that the finding of the jury that the respondents had not themselves been negligent as regards this obligation was, therefore, irrelevant. The Court of Appeal reversed this judgment, on the ground that this House in *Britannic Merthyr Coal Co.* v. *David* (1) had decided by implication that the obligation was not absolute, but was satisfied if the colliery owners had done their best by selecting proper officials and furnishing them with the means of carrying out the provisions of the statute, and with proper instructions to do so.

In order to determine which of these views of the Coal Mines Regulation Act, 1887, is correct, it is necessary to refer to its provisions. The Act is divided into three parts. The first part imposes certain general conditions of employment in coal mines. The second part, which commences with s. 49, enacts certain general rules which are to be observed, as far as reasonably practicable, in every coal mine ; and the third part contains provisions relating to legal proceedings and other supplemental matters. Sect. 16 provides that the owner of a mine shall not employ any person in the mine, or permit him to be there for the purpose of employment, unless, among other conditions, the following condition is complied with. Proper apparatus for raising and lowering persons at the shaft is to be kept on the works belonging to the mine, and such apparatus is to be constantly available for use.

It is not disputed that this is a provision for the benefit of the workman, and that if it is broken he may therefore, if he can prove special damage, succeed in an action. The real question is whether it imposes an absolute obligation, to the allegation of breach of which it is no answer that the colliery company have not been personally negligent.

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(1) [1910] A. C. 74.

I am of opinion that this is the true view, and that no question of negligence or of the doctrine of common employment is relevant. The statute appears to me to impose a condition without qualification with which the colliery owners are bound to comply. I do not desire to be understood as dissenting from the view finally adopted by Pickford J., that r. 30 of s. 49 would in itself entitle the plaintiff to succeed, though I think that the question which he put to the jury at an earlier stage, and to which I have already referred, was misconceived. I only wish to say that it does not appear to me necessary to resort to the general rules enacted under that section, because neither these rules nor any special rules made under s. 51 for the guidance of those employed in the mine do, on the true construction of the Act, affect the conditions imposed by s. 16. The latter section was referred to both before Pickford J. and in the Court of Appeal, but sufficient attention was not paid to it. In my opinion it is decisive of this case when it is applied to the facts found by the jury.

The learned judges in the Court of Appeal considered that they were bound by the decision of this House in *Britannic Merthyr Coal Co.* v. *David* (1) to hold that an analogous provision as to shot firing under s. 49 did not import an absolute obligation, because otherwise judgment would have been entered for the plaintiff instead of a new trial being directed. But in that case a new trial was all that was asked for, the reason being that the judge who tried the case had misled the defendants into not giving evidence by ruling that the burden of proving negligence rested on the plaintiff. My noble and learned friend Lord Halsbury expressed no opinion on the construction of s. 49, and no question arose on the earlier provisions of the statute which are material in this case.

For the reasons I have indicated I am of opinion that the plaintiff in the present action was entitled to succeed. It is, therefore, unnecessary to consider whether the claim could have been successfully made, apart from the provisions of the statute, on the ground of negligence at common law. The consideration

(1) [1910] A. C. 74.

of this alternative ground of action would raise questions as to the meaning of the verdict, and as to the effect of the doctrine of common employment, which do not arise if, as I think it ought to be, the case is treated as one of a simple breach of a statutory obligation.

I move that the judgment of the Court of Appeal be reversed, and that the appeal be allowed with costs.

EARL OF HALSBURY. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I agree.

LORD ATKINSON. My Lords, this appears to me to be a perfectly plain and simple case, and I think that if the Lords Justices had not failed to appreciate correctly what was the precise point decided by this House in *Britannic Merthyr Coal Co.* v. *David* (1), and what were the true grounds of that decision, they would have come to a conclusion entirely different from that at which they arrived.

In that case a miner, the husband of the plaintiff, was killed by an explosion in a mine. It was found by the jury that this explosion was caused by the firing of a shot in blasting operations. In firing this shot the rules set out in s. 49 of the Coal Mines Regulation Act of 1887, dealing with such matters, were violated in several respects. First, the shot was not fired by the duly appointed shot-firer, but by two fellow workmen of the deceased. Second, it was fired in a prohibited area without the precautions required by the rules having been taken, and, in addition, there was strong evidence to shew that an explosive prohibited by the rules—gunpowder—had, in fact, been used. Now the combined effect of ss. 49 and 50 of this statute is, where rules such as those mentioned are violated, I think, this. They make every person who contravenes, or does not comply with them guilty of an offence against the Act, and therefore impose upon such persons corresponding statutory obligations to observe them.

Each person concerned is thus made responsible for every breach of the rules which he has himself committed, and for every failure of his to observe them. But that is not all. The 50th section goes further. It makes each of the following persons, the owner, agent, and manager, prima facie guilty of an offence against the Act if any of the rules have been violated, or not observed by a person or persons other than themselves, even though the act or omission of these others took place without their knowledge or consent. The section, however, provides for the person or persons thus vicariously made liable for the acts of others a means of escape from all liability. It is only necessary for them to establish that they have taken all reasonable means, by publishing, and to the best of their power enforcing, the rules and regulations for the working of the mine, in order to protect themselves from this liability.

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(1) [1910] A. C. 74.

Nothing can, I think, be plainer on the construction of this section than that this latter is a matter of defence to the criminal liability, the burden of proving which rests upon the owner, agent, or manager, as the case may be, who desires to exculpate himself. And if it be a defence against criminal responsibility it is clearly, I think, a matter of defence against civil responsibility also.

Channell J. in *David's Case* (1) lost sight of this fact, and instructed the jury that the burden of proving that the contravention of the rules by the two workmen who fired the shot was brought about by the neglect of the defendants to take reasonable means to prevent such a contravention of them by enforcing the rules to the best of their ability, lay upon the plaintiff, which in effect amounted to telling them that the plaintiff was bound to prove, in anticipation, that the defendants had no defence.

Your Lordships held that this amounted to misdirection of the jury, and, because of that, awarded to the plaintiff the only relief her counsel asked for, namely, a new trial of the action.

The only point decided in this House was therefore this, that the owner of the mine must himself prove the facts which relieve him from liability for the acts done by one of his workmen in violation of the general rules.

Again, *David's Case* (1) was not touched by any of the provisions of s. 16 of the statute. That section applies directly to the present case, and the appellant is not, I think, precluded from

(1) [1910] A. C. 74.

Lord Atkinson.

relying upon it, either by the form of pleading adopted by her or by the course the argument took in the Court of Appeal. Sir Robert Finlay has convinced me that the bearing of this section upon the case was discussed in the Court of Appeal, and as to the form of pleading, it is quite plain that, in describing one, at least, of the particular breaches of statutory duty relied upon, language is used which correctly describes the particular breach of the provisions of this section which actually took place. It is letter H (p. 10 of the record) and runs thus:

"(H) The winding engine by means of which the said Albert Watkins was lowered into the said mine was a machine worked by steam and used for lowering and raising persons and there was not attached to it an adequate brake."

It is said that this language would equally describe a breach of the thirtieth of the general rules. That may well be. But that coincidence furnishes, in my mind, no ground whatever for the respondents' contention that the appellant's action was founded solely on a breach, or on breaches, of the general or special rules, to the exclusion of s. 16. Now this section deals with matters of construction and equipment. It is unqualified in its terms. It does not provide any means of escape from the prima facie liability it imposes, such as is provided by ss. 50 and 57 in the cases of breaches of the general and special rules respectively; it imposes on the owner, agent, and manager of a mine an absolute duty not to employ any person in the mine, or permit any person to be in the mine for the purpose of being employed in it, unless the following condition, amongst others, be complied with, namely, this, that proper apparatus for raising and lowering persons at each shaft or outlet shall be kept on the works belonging to the mine, and, even if not in actual use, shall be constantly available for use.

Every owner, agent, or manager who acts in contravention of or fails to comply with this provision of the section is made guilty of an offence against the Act, and the working of a mine in which any person is employed, or is permitted to be for the purpose of employment, in contravention of the section, may be restrained by injunction, without prejudice, however, to any other remedy permitted by law for enforcing the provisions of the Act.

It is urged, however, that this is merely a negative requirement. I confess I can see no difference whatever in prescribing that a certain thing shall not be done, unless certain apparatus be provided, and in prescribing that if that thing be done the particular apparatus shall be provided. Both are equally imperative and obligatory. If a workman is to be lowered into a mine, or raised from it, and he cannot be employed in the mine unless this be done, then the owner must have the mine equipped with apparatus, always ready for use, proper for lowering him into and raising him from it.

Here the owners had miners working in the mine, and that being so, the absolute obligation above described rested upon them.

If any meaning is to be given to words, an apparatus proper for any particular work must mean an apparatus adequate to do that work. It is not enough that it should be adequate to do some other work which puts less strain upon it. In the present case, the manager, Samuel Hollister, deliberately, formally, and with the publicity required by the special rules, to the framing of which the owners of the mine must be taken to have been parties, put the apparatus provided to do work which it was inadequate to do, namely, to carry a load of twenty-six men. It had no brake power proper for such a load. It was dangerous to use it for this purpose in the absence of such brake power. Mr. Samuel Hollister, in answer to the trial judge, admitted (p. 219 of the record) "that it would be dangerous to run the winding engine without a brake that would stop it without the reversing gear." It had no such brake, and the proof of this is that for two months, during which the increased load was carried, the reversing gear had to be employed to prevent the evil results which would probably have followed from the insufficiency of the brake.

The jury have found that the brake attached to the winding gear was inadequate for lowering twenty-six men, and the only answer the respondents have to give to this finding is that the owners appointed a competent manager, that he directed the overloading, and that they are entirely irresponsible for the consequences of his action in this respect. In my view that is no answer at all. The owners have deliberately clothed their manager with authority to direct the number of persons to be carried up and down in each compartment of a cage (rule 6 of special rules).

That direction if given is not only to be legibly put up and maintained in a conspicuous place on the surface near the shaf head, but is to be recorded in the books of the colliery. It is, I think, impossible to contend that the owners are not responsible for the action, so authorized, of their manager, or that they are not bound to provide apparatus adequate to do the work he, by virtue of the authority they have so clothed him with, directs to be done. They have not supplied such an apparatus. The death of the deceased has been caused by reason of their failure in this respect, and the plaintiff is therefore, in my view, clearly entitled to recover. I think, accordingly, that the decision of the Court of Appeal was wrong and should be reversed, and this appeal be allowed with costs.

Order of the Court of Appeal reversed and judgment of Pickford J. restored. The respondents to pay the costs in the Courts below and of the appeal to this House.

Lords' Journals, July 19, 1912.

Solicitors for appellants: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Barlow, Barlow & Lyde, for C. & W. Kenshole, Aberdare.*

[HOUSE OF LORDS.]

H. L. (E.)*
1912
July 19.

BRITISH ASSOCIATION OF GLASS BOTTLE MANUFACTURERS, LIMITED . . . . APPELLANTS;

AND

NETTLEFOLD . . . . RESPONDENT.

Practice—Discovery—Affidavit of Documents—Further Affidavit—Rules of the Supreme Court, Order XXXI., *rr.* 12, 19A.

Although as a general rule an affidavit of documents is conclusive against the party seeking discovery, in the absence of any admission in that or some other document by the party making the affidavit that he has in his possession or power other documents material and relevant to the issue, yet, where the affidavit is based upon a misconception of his case by the party making the affidavit, and the Court is practically certain that he has in his possession or power other relevant documents which ought to have been disclosed and which he would have disclosed if he had rightly conceived his case, the Court will order a further and better affidavit.

Decision of the Court of Appeal [1912] 1 K. B. 369, affirmed.

APPEAL from an order of the Court of Appeal (Cozens-Hardy M.R. and Farwell L.J.) reversing an order of Bucknill J. and ordering the appellants to file a further and better affidavit of documents. (1)

The following statement of facts is taken from the judgment of the Lord Chancellor.

The action was brought by the appellants against the respondent, who was a shareholder in the appellant company, to recover calls. The defence was twofold. The respondent alleged that the appellants, although nominally registered as a company under the Companies Acts, were in reality a trade union, and consequently under s. 5 of the Trade Union Act, 1871, their registration was void. In the second place it was alleged that the appellants were a combination or association illegal at common law as being in restraint of trade by arbitrarily restricting output and fixing prices, and that consequently the appellants could not sue.

* *Present:* VISCOUNT HALDANE L.C., LORD ASHBOURNE, LORD MACNAGHTEN, and LORD ATKINSON.

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(1) [1912] 1 K. B. 369.

An order for directions was made on July 26, 1911, ordering against the appellants an affidavit of documents. On October 25, 1911, an affidavit was delivered disclosing certain documents, and among them a mortgage by the appellants and a foreign company to another company called Owen's European Bottle Machine Company, together with a form of licence to use Owen's machine.

In his statement of defence the respondent had given particulars relating to the alleged illegality at common law, and had alleged in these particulars that the appellants had entered into agreements with the foreign company above referred to, being an international association of glass bottle manufacturers formed for similar purposes in restraint of trade.

It was further alleged in these particulars that there was a written contract between the appellant company and the foreign company for regulating the relations between them and their dealing with Owen's patent, with a view to controlling output and price; and that in pursuance of this purpose the appellants had granted written licences to certain licensees containing clauses intended to secure restriction.

The appellants' solicitors, in reply to a letter of July 12 asking for production of this contract, wrote on October 25 that no such contract had any bearing upon or relevance to any question in the action; and that in consequence they had not included any such document in their affidavit of documents, although they did not seek to say that they had not such a document in their possession.

On this a summons was taken out by the respondent under Order xxxi., r. 19A (3.), for inspection of the contract. In his affidavit in answer the secretary to the appellants deposed that no such contract was relevant to the questions in issue, and for that reason no such document had been included in the affidavit of documents.

On November 7 the Master ordered production of the contract, but Scrutton J. on appeal directed the application to be adjourned to the judge who should try the case, on the ground that he was not then satisfied that the document should be inspected, but thought that it might become material at the trial.

The Court of Appeal set aside the order of Scrutton J. on November 23, and restored the Master's order directing production of the contract.

The respondent's solicitors then wrote to the appellants' solicitors stating that, as a consequence of the judgment of the Court of Appeal, the view taken originally by the appellants as to the relevancy of the document now produced had been found to be erroneous, and that they assumed that the appellants would now wish to do what should have been done at the outset, and produce various documents which they suggested must exist, and which they alleged must now be taken to bear on the issues raised. They therefore asked for a further affidavit of discovery. The appellants' solicitors wrote in reply declining to file a further affidavit, and the respondent's solicitors thereupon took out a summons to enforce their demand. The Master refused to make an order, and Bucknill J. affirmed his decision. The respondent appealed to the Court of Appeal, and on December 16 the Court of Appeal reversed the decision and ordered a further and better affidavit of discovery.

In the meantime, on November 27, the Master had made an order for interrogatories, in answer to which the appellants stated that certain licences had been granted in the form of a written licence already disclosed in the original affidavit of documents. Upon an order for a further and better answer, it was stated in an affidavit by the secretary of the appellants that there had been no other licences.

1912. July 1. *Younger, K.C.*, and *Alexander Neilson*, for the appellants. The agreement which has been produced is an agreement by which the appellants were to have the English rights in Owen's patent on the terms that any licence to be granted by the appellants thereunder should contain certain stipulations. The respondent has had all the discovery to which he is entitled. The agreement, the form of the licence, and the names of the licensees have all been disclosed. Nowhere is there any admission of any document being in the appellants' possession beyond those which have been already discovered. The respondent has filed no affidavit in support of his application. The rule of

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law stated in *Jones* v. *Monte Video Gas Co.* (1), which was a considered judgment of the Court of Appeal after consultation with the other branch of the Court, is that an affidavit of documents is conclusive against the party seeking discovery, unless it can be shewn either from the affidavit itself or from documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, that other documents exist in his possession or power which are material and relevant to the action. *Hall* v. *Truman, Hanbury & Co.* (2) proceeds on the same principle. That principle is reaffirmed by Lord Herschell in *Morris* v. *Edwards.* (3) The affidavit of documents is conclusive, subject to the exceptions stated in *Jones* v. *Monte Video Gas Co.* (1) and to the special exception introduced by Order XXXI., r. 19A, as to individual documents. In *Attorney-General* v. *Emerson* (4) the application was for production of documents admitted to be in the possession of the defendant, and the observations of Brett L.J. on which the Master of the Rolls relied were directed to a different issue. The Lord Justice was dealing with documents which were admitted to be in the possession of the defendant but the description of which was alleged to have been misstated. *Kent Coal Concessions, Ld.* v. *Duguid* (5) is not opposed to the appellants' contention because a balance-sheet cannot exist without books, and the balance-sheet in question in that case expressly referred to the books. Moreover the decision in that case went the same way throughout and Lord Atkinson expressly founds his decision on that circumstance. Order XXXI., r. 19A, is exhausted by the production of the specific document. In this case there is nowhere any admission of any document being in the possession of the appellants which has not been disclosed.

Buckmaster, K.C., and *A. H. Chaytor*, for the respondent. The appellants have excluded from their affidavit documents of which the document which has been produced under an order of the Court is a type, as not material or relevant to the issue. But the materiality of the particular document has now been established

(1) (1880) 5 Q. B. D. 556.

(2) (1885) 29 Ch. D. 307.

(3) (1890) 15 App. Cas. 309, at p. 314.

(4) (1882) 10 Q. B. D. 191.

(5) [1910] A. C. 452.

by the decision of the Court of Appeal and there is no appeal against that. The inference is that the appellants' affidavit of documents was sworn under a complete misapprehension as to what was the real materiality of the documents in their possession. The respondent is entitled to an affidavit sworn on a just appreciation of the materiality of the documents: *Attorney-General* v. *Newcastle-upon-Tyne Corporation.* (1)

Younger, K.C., in reply. There is no such class of documents as the respondent alleges. No argument can be founded on the non-disclosure of the licences, because the form of the licences was disclosed and the names of the licensees were not important; moreover, the respondent got that information by means of interrogatories. The appellants have not misunderstood their case, but they mentioned one document which they believed to be not relevant.

The House took time for consideration.

July 19. Viscount Haldane L.C. My Lords, the question which arises in this appeal is whether the appellants should be ordered to file a further and better affidavit of discovery.

[His Lordship stated the facts as above set out, and continued :] The ground of the decision of the Court of Appeal on December 16 was that the Court was entitled to draw the inference that there were documents not disclosed originally which had been withheld in the belief, ascertained by the previous decision of the Court of Appeal to be erroneous, that such documents were not relevant. The Master of the Rolls said that the old Court of Chancery would not allow cross-examination upon an affidavit of documents, but that if there were an admission by the person making the affidavit, either in the affidavit itself or in some other document, which shewed that there were other documents which ought to have been included, the Court could act. Adopting the language of Lord Esher in *Attorney-General* v. *Emerson* (2), he said that "if the Court had that degree of certainty that the defendant had in that sense misconceived the nature of the documents, then the Court is entitled not to act upon the affidavit."

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(1) [1897] 2 Q. B. 384.

(2) 10 Q. B. D. 191.

Farwell L.J. took the same view. He pointed out that under Order XXXI., r. 19A (3.), the strictness of the principle that the statement in an affidavit of documents must be taken as conclusive was relaxed by enabling a person dissatisfied with the affidavit, by suggesting a specific document and his belief that the other party had it, to compel him to make a further affidavit. He said that, while the general principle of the old rule as to discovery remained, the practice of the Court was at all events to this extent not rigid, that if there appeared from the contents of the affidavit of documents to be other documents that were obviously omitted, a further affidavit might be ordered.

The ground of the decision of the Court of Appeal was therefore based on the proposition that the appellants had originally made a mistake in the principle by which they were guided as to relevancy, and that having omitted to apply the proper principle the affidavit of documents was to this extent discredited. If, therefore, on the face of it, or from admissions in other documents, the Court had reasonable ground for being fairly certain that there were other relevant documents which ought to have been disclosed, it could order further discovery.

My Lords, I think this decision was right. It was contended before your Lordships that the respondents had got all that the rules applicable entitled them to get, and that neither the affidavit itself nor any admissions in the pleadings or other documents shewed that there were in the plaintiffs' possession any relevant documents not disclosed. But while it is true that as a general rule you cannot go behind the affidavit in the absence of admissions in that or some other document, the rule is qualified where the basis on which the affidavit of documents has been made turns out to have been wrong. If the party making the affidavit has misconceived his case, so that the Court is practically certain that if he had conceived it properly, and had acted upon a proper view of the law, he would have disclosed further documents, then the Court can refuse to recognize an affidavit as conclusive, and order a further affidavit.

In this case the letter of October 25 already referred to is sufficient to discredit the original affidavit, and I think that the circumstances are such as to justify the order appealed from.

I desire to make only one further observation. Unless under very exceptional conditions I do not think that a case in which, even assuming that the appellants had been right in their contention, the only matter at stake was this obligation of filing a brief further affidavit denying, if they could, that they had further documents, was a proper case to bring before this House by way of appeal. The decision of the Court of Appeal is not one against which I should have been disposed to encourage an appeal to this House even had I not agreed with it.

I move your Lordships to dismiss the appeal with costs.

Lord Ashbourne. My Lords, I concur.

Lord Macnaghten. My Lords, I concur.

Lord Atkinson. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 19, 1912.

Solicitors for appellants: *Crowders, Vizard, Oldham & Co.*
Solicitors for respondent: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

H. L. (E.)* LLOYD (Pauper) . . . . Appellant;
1912
AND
July 19. GRACE, SMITH & CO. . . . . Respondents.

Principal and Agent—Authority—Liability of Principal for Fraud of Agent.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

Barwick v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259, is not an authority for the proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal.

Dicta of Lord Bowen, when Bowen L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. ~~465~~, overruled.

A widow, who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell the cottages and to call in the mortgage money, and for that purpose to give him her deeds (for which he gave a receipt in the firm's name); and also to sign two documents, which were neither read over nor explained to her, and which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit:—

Held, that the firm were responsible for the fraud committed by their representative in the course of his employment.

Decision of the Court of Appeal [1911] 2 K. B. 489, reversed.

Appeal from an order of the Court of Appeal reversing a judgment of Scrutton J. (1)

The appellant, who was a widow, owned two freehold cottages at Ellesmere Port, which she had purchased in 1909 for 540*l.*, and a sum of 450*l.* advanced to one Rushworth on a mortgage of a house in Hartingdon Road, Liverpool.

The respondents were a firm of Liverpool solicitors of old standing

* *Present:* Earl Loreburn, Earl of Halsbury, Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline.

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(1) [1911] 2 K. B. 489.

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and high repute, but the business was in fact carried on by Frederick Smith (hereinafter referred to as the respondent) alone in the name of the firm.

The respondent's firm had acted as solicitors to the vendor on the sale of the Ellesmere Port property and the appellant had become acquainted with the firm in the course of this transaction.

On January 11, 1910, the appellant, being dissatisfied with the income derived from this property, called at the office of the respondent's firm for the purpose of consulting them on the matter. At the office she saw one Sandles, who was the respondent's conveyancing manager and managing clerk. Sandles conducted the conveyancing work of the firm without supervision. He had authority to arrange and negotiate sales of real property and to carry them out, and also to receive deeds for safe custody. The respondent's time was largely taken up in attending to his public duties as an alderman of the city of Liverpool, and in his absence Sandles was left in charge of the office. Sandles was unknown to the appellant, who believed him to be a member of the respondent's firm. At this interview the appellant discussed with him both the Ellesmere Port property and the Liverpool mortgage. He said that she was not getting enough for her money and asked her to call again and bring with her the deeds relating to the Ellesmere Port property and to the mortgage.

On January 12 the appellant again called at the respondent's office, bringing the deeds with her, and had another interview with Sandles. Acting on his advice she instructed him to sell the cottages and call in the mortgage money. The reinvestment of the money was then discussed, and Sandles suggested that the money should be invested in certain companies in which he was interested and which he told her would produce 10 per cent., but nothing was settled as to that. The appellant left her deeds with Sandles, who gave a receipt for them in his own name. In the course of this interview Sandles left the room, taking the deeds with him. After an interval of twenty minutes he returned with a clerk and produced two documents which he asked the appellant to sign. These documents were not read over to the appellant and were not explained to her. She signed them without reading them, believing that they were something she had to sign before the sale could be proceeded with. These documents were in fact a conveyance by the appellant to Sandles of the Ellesmere Port property at the price of 540*l.* and a transfer by her to him of the mortgage on the Liverpool property in consideration of the sum of 450*l.*

On the following day, January 13, Sandles mortgaged the Ellesmere Port property to the Union Credit Bank to secure a loan to himself of 378*l.* and interest, expressed in the mortgage as 550*l.*, and he also gave notice to Rushworth of the transfer to him of the mortgage on the Liverpool property and called in the mortgage money.

On January 14 the appellant, who had been advised by a friend that she ought to get a receipt for the deeds in the name of the firm, wrote to Sandles cancelling her instructions to sell the cottages and to call in the mortgage.

On January 17 the appellant again saw Sandles at the office and told him she had changed her mind as to the investment of her property and proposed to buy Corporation stock. Sandles told her that that was not solicitors' work and she should consult a stockbroker. He also told her that he had already called in the mortgage money and advised her to leave her deeds with him. Pointing to a pile of deed boxes in the office he said "They will be quite safe with us." The appellant then told him not to proceed with the sale of the Ellesmere Port property and asked for a receipt in the firm's name for her deeds. Sandles gave her a receipt for both sets of deeds, dated January 17, 1910, which he signed "Grace, Smith & Co. C. W. S."

On March 12 Sandles wrote to the appellant enclosing a cheque for interest on the Liverpool mortgage which he said Rushworth had sent him and stating that the mortgage would be paid off in April. Rushworth did not in fact pay off the mortgage, but on April 5 Sandles transferred the mortgage to one Littler and received from him 450*l.*, which he applied in paying a private debt of his own. On April 28 Sandles called on the appellant and told her that the mortgage money would be paid the following week, and he gave her a cheque of his own for 450*l.* dated May 3. This cheque was not presented and it would not have been honoured. About the end of April the fraud by which Sandles had deprived the appellant of her property was discovered by the respondent. On May 2, at an interview which the appellant had with the respondent at his office, the respondent told her that he had required Sandles to repay the money which he owed the Union Credit Bank on the mortgage of the Ellesmere Port property, and that Sandles had promised to send him 450*l.* but had only sent 250*l.*, and he offered to lend her 200*l.* in order to recover the deeds from the bank. The appellant then went with the respondent to the bank, and the deeds were handed over to the respondent on payment of 450*l.*, which comprised the 250*l.* received from Sandles and 200*l.* lent by the respondent. The deeds were retained by the respondent.

No imputation was cast upon the honour of the respondent.

In these circumstances the appellant commenced an action against the respondent's firm for delivery up of the deeds of the Ellesmere Port property and for payment of the 450*l.* advanced on the Liverpool mortgage. The appellant by her statement of claim alleged that she instructed the respondents as her solicitors to sell her Ellesmere Port property and to call in the money advanced on the Liverpool mortgage; that for the purpose of enabling the respondents to effect the said sale and calling in she delivered to the respondents her deeds relating to those properties; that the respondents had not sold the Ellesmere Port property and had refused to return her deeds. She also alleged that the respondents had called in and received the 450*l.* lent on mortgage. The respondents by their defence denied that the appellant had ever instructed them as her solicitors, and they pleaded alternatively that the appellant had conveyed the Ellesmere Port property and transferred the mortgage to Sandles, and that they had paid off the mortgage granted by Sandles to the Union Credit Bank, and had become entitled to the said freehold property and to the possession of the deeds relating thereto; and that as to the mortgage money the appellant had ceased to have any interest in it when the mortgage was transferred by Sandles to Littler. The appellant in her reply denied having executed the indentures of conveyance and transfer to Sandles, and alleged alternatively that she was induced to execute the said indentures by the fraud of Sandles acting in the course of his employment and within the scope of his authority as managing clerk of the respondents, and that he fraudulently stated to the appellant that her execution of the said indentures was necessary and usual to enable the respondents to sell the Ellesmere Port property and to call in the mortgage money.

The action was tried at Liverpool before Scrutton J. and a special jury.

The learned judge left certain questions to the jury which together with their answers thereto were as follows :

(1.) In receiving the deeds and taking instructions to sell the property and call in the mortgage debt did Sandles profess to act in his private capacity or as conveyancing manager to Grace, Smith & Co.?—He professed to act as conveyancing manager to Grace, Smith & Co.

(2.) If he professed to act as conveyancing manager to Grace, Smith & Co., was he in reality acting on his own behalf and for his own benefit?—He acted in reality on his own behalf and for his own benefit.

(3.) In receiving the deeds of the property and the mortgage did he act (*a*) in the course of his business as conveyancing manager?—Yes. (*b*) For his master's benefit?—No.

(4.) In taking a transfer of the Ellesmere Port property and pledging it did he act (*a*) in the course of his services as managing clerk?—No. (*b*) For his master's benefit?—No.

(5.) In taking a transfer of the mortgage to himself did Sandles act (*a*) in the course of his business as managing clerk?—No. (*b*) For his master's benefit?—No.

(6.) In calling in the mortgage debt and transferring it did he act (*a*) in the course of his master's business?—Yes. (*b*) For his master's benefit?—No.

The jury added to their findings the following rider :—" The jury are of opinion that throughout the whole history of the transaction Mrs. Lloyd believed she was dealing with Messrs. Grace, Smith & Co."

It was agreed between the parties at the trial that any supplementary findings of fact which it became necessary to decide should be made by the judge. In accordance with this agreement, Scrutton J. found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the appellant did rely on the representations of Sandles, professing to act on behalf of the firm, that the documents in question were necessary to facilitate and carry out the sale of the land to her; that she did not know she was signing conveyances to Sandles outside the scope of his authority, and that she was justified in relying on the representations of Sandles without reading and trying to understand the documents tendered to her, but that she knew she was signing something affecting her estate.

On these facts Scrutton J. gave judgment for the appellant for the return of the deeds of the Ellesmere Port property and for the sum of 450*l.* in respect of the claim relating to the mortgage. In the opinion of the learned judge, where a servant acted within his apparent authority but for his own benefit the master was liable for his acts whether in contract or tort. As he read the rule of law laid down by Willes J. in *Barwick* v. *English Joint Stock Bank* (1) it did not mean that, in order to make the master liable, it was essential that the servant, though acting in the apparent course of his employment, should act for his master's benefit, and he dissented from the dictum of Lord Davey in *Ruben* v. *Great Fingall Consolidated*. (2) With regard to the answer of the jury to question 6 (*a*) he held that there was no evidence to support it, and he accordingly disregarded that answer.

The Court of Appeal (Farwell and Kennedy L.JJ., Vaughan Williams L.J. dissenting) reversed this decision and ordered that judgment should be entered for the defendants (the respondents).

1912. Feb. 27, 29. *Tobin, K.C.*, and *J. A. Johnston*, for the appellant. The principal is liable, whether the action be founded on contract or tort, for the act of his agent done within the scope of his authority, and whether the act be careful or negligent, honest or fraudulent.

This is established as regards contracts by *Bryant, Powis &*

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(1) L. R. 2 Ex. 259, at p. 265.

(2) [1906] A. C. 439, at pp. 445, 446.

Bryant, Ld. v. *Quebec Bank* (1) and *Hambro* v. *Burnand* (2), and as regards torts by *Thompson* v. *Bell* (3), *Swire* v. *Francis* (4), and *Trott* v. *National Discount Co.* (5) Bowstead on Agency, 4th ed., p. 264, art. 80, sums up the appellant's argument. Willes J. in *Barwick* v. *English Joint Stock Bank* (6) does not say that a principal will not be liable for an act done by his agent within the scope of his authority, unless the act is done for the benefit of his principal. The sole question is whether the act is within the scope of the agent's authority. The appellant's deeds having got lawfully into the possession of the solicitors, the fraud of their agent in stealing them is no answer to the action. Further, the documents which the appellant was induced to sign, not knowing what they were, are not her deeds.

Greer, K.C., and *Cuthbert Smith*, for the respondents. This is a claim for the return of goods bailed and alternatively for false representation. As regards the first claim, where goods are deposited with a person for safe custody, he is not liable if his servant afterwards converts the goods to his own use: *Cheshire* v. *Bailey* (7); *Jobson* v. *Palmer* (8); *Giblin* v. *McMullen.* (9) There is no authority for the proposition that a solicitor receiving the deeds of a client for safe custody is under any greater liability than a banker, who in the last cited case was held to be not responsible. His only duty is that of an ordinary bailee. As regards the second claim, where a tort—whether it be false representation, trespass, conversion, or any other wrongful act—is committed by a servant, the master is not responsible if the object in committing the tort is the servant's own benefit and not the benefit of the master: *Barwick* v. *English Joint Stock Bank* (6); *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (10); *Thorne* v. *Heard* (11); *Ruben* v. *Great Fingall Consolidated* (12); *Sanderson* v. *Collins.* (13)

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(1) [1893] A. C. 170.
(2) [1904] 2 K. B. 10.
(3) (1854) 10 Ex. 10; 23 L. J. (Ex.) 321.
(4) (1877) 3 App. Cas. 106.
(5) (1900) 17 Times L. R. 37.
(6) L. R. 2 Ex. 259, at p. 265.
(7) [1905] 1 K. B. 237.
(8) [1893] 1 Ch. 71.
(9) (1868) L. R. 2 P. C. 317.
(10) 18 Q. B. D. 714.
(11) [1894] 1 Ch. 599, at p. 615; affirmed [1895] A. C. 495.
(12) [1906] A. C. 439, at pp. 445, 446.
(13) [1904] 1 K. B. 628, at p. 632.

[The EARL OF HALSBURY referred to *Limpus* v. *London General Omnibus Co.* (1)]

Where an agent has authority to contract and the contract is made, the motive of the agent in making the contract is immaterial, and the principal is liable, for the reasons stated by Mathew L.J. in *Hambro* v. *Burnand* (2), but that is not so in the case of a tort, and the moment that an agent commits a voluntary wrongful act for his own benefit he ceases to be acting within the scope of his authority.

Further, this was not solicitors' business. The terms proposed by Sandles as to reinvestment were Sandles' business, and the property was to be sold and the mortgage money called in merely to enable Sandles to put the money into his own companies. Up to the point when Sandles gave the receipt for the deeds in the firm's name he had done nothing to induce the appellant to believe that he was acting on behalf of the respondents. So long as findings 4 and 5 stand judgment cannot be entered for the appellant.

J. A. Johnston in reply. The rule laid down by Willes J. in *Barwick* v. *English Joint Stock Bank* (3) has been misunderstood by Lord Davey in *Ruben* v. *Great Fingall Consolidated* (4), and his dictum was not necessary for the decision of the case, because the act there was clearly not within the scope of the agent's authority. The same remark applies to the dictum of Bowen L.J. in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (5) There is no foundation for the distinction between contract and tort for this purpose. The principle of the liability is agency, and if the act done is within the scope of the agent's authority the nature of the act is immaterial. [He also referred to *Rhodes* v. *Moules.* (6)]

The House took time for consideration.

March 28. EARL LOREBURN L.C. moved that the order appealed from be reversed and the judgment of Scrutton J.

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(1) (1862) 1 H. & C. 526.
(2) [1904] 2 K. B. 10, at p. 25.
(3) L. R. 2 Ex. 259, at p. 265.
(4) [1906] A. C. 439, at p. 445.
(5) 18 Q. B. D. 714, at p. 718.
(6) [1895] 1 Ch. 236.

restored, and intimated that the reasons for their Lordships' decision would be given at a later date when all the members of the House who were present at the hearing of the argument would be able to attend and express their opinions.

July 19. Their Lordships now gave their reasons for this decision.

Earl Loreburn. My Lords, the facts of this case, except in immaterial points, are quite clear and undisputed.

The appellant, Mrs. Lloyd, had bought some property, and thus had come to know of the defendant, a solicitor. She had doubts about having got her money's worth, and went to the defendant's office to inquire. When there she saw one Sandles, the defendant's managing clerk, and was induced by him to give him instructions to sell or realize this property, and for that purpose to give him the deeds and to sign two documents which she neither read nor knew the tenor of, but which put into Sandles' possession her interest therein. She gave him the deeds as the defendant's representative. Having got them and the signed documents, he dishonestly disposed of this lady's property and pocketed the proceeds. That is the whole story as it is now either found or admitted because it was incontestable.

It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm,—and she so treated him throughout—to realize her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

At the hearing the learned judge, no doubt with a view to avoid the risk of a new trial in so small a case, appears to have been prevailed upon to put no less than six questions, with subdivisions making in all ten questions, to the jury. Some of them were quite immaterial. Others were framed in order to raise a point of law supposed to be affirmed by Willes J. in the case of *Barwick* v. *English Joint Stock Bank* (1), in a passage which admitted of more than one meaning. The meaning of the answers depends upon how the jury understood the questions, and we were not told how they were explained to the jury. That Sandles committed this fraud in order to steal the money for himself is obvious, and any jury must so find. That he did it in the sense in which Willes J. means the word "benefit" is not true upon the admitted facts. Willes J. cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that.

I have only to say, as to the authority of *Barwick* v. *English Joint Stock Bank* (2), that I entirely agree in the opinion about to be delivered by Lord Macnaghten. If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it. And if the whole judgment of Willes J. be looked at instead of one sentence alone, he does not say otherwise.

EARL OF HALSBURY. My Lords, I, in common, I believe, with all your Lordships, think that this appeal must be allowed and that judgment must be entered for the plaintiff, and but for what appears to me a singular misapprehension I should not have thought it necessary to add anything to Scrutton J.'s very careful and very accurate judgment; but I think the judgment in *Barwick* v. *English Joint Stock Bank* (2), in the Exchequer Chamber, has been misunderstood, and as it is certainly a

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(1) L. R. 2 Ex. 259, at p. 265.

(2) L. R. 2 Ex. 259.

Earl of Halsbury.

judgment of very high authority it is desirable to examine it carefully and to see what it really did decide.

It was a decision of the Exchequer Chamber delivered by Willes J., the Court consisting of Blackburn, Keating, Mellor, Montague Smith, and Lush JJ., as well as the learned judge who probably, though not certainly, wrote the judgment, and with whom all the judges concurred—a judgment, therefore, of the very highest authority, and one which I think it would be impossible to suppose we are saying anything to shake.

The actual decision of the Court was that Martin B. was wrong in nonsuiting the plaintiff and there must be a new trial, and I think one source of the misapprehension to which I have referred is the care with which the learned judges avoided deciding or assuming how the question was to be decided by the jury in the trial which was then ordered.

So far from giving any authority for the proposition in favour of which it is quoted, the Court went out of its way to disclaim there being any doubt about the rule that the principal is answerable for the act of his agent in the course of his master's business, and the words added, "and for his benefit," obviously mean that it is something in the master's business; and the judgment in question says that that question was settled as early as Lord Holt's time, a tolerably strong indication that the judges thought there was not much doubt about what the law is now.

Sir John Holt, the authority who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history, and who has been described as a perfect master of the common law, speaks in the case cited by Willes J. (*Hern* v. *Nichols* (1)) with no uncertain voice upon the subject, confirmed and adopted by such a Court as I have described after more than two centuries. The case was this: An action on the case for deceit was brought by one Hern against a merchant named Nichols. The reporter seems to have had some difficulty in making out what the particular kind of silk in question was, for he has left its description blank, but enough of the pleadings is given to indicate very clearly what the complaint was, and in effect, it was alleged

(1) (Undated, c. 1700) 1 Salk. 289.

that one kind of silk was represented to be sold as such, and another and an inferior sort of silk was supplied.

Upon trial, says the report, not guilty pleaded, it appeared there was no actual deceit by the defendant, but it was his factor beyond sea, and the doubt was whether this should charge the merchant; and Holt C.J. was of opinion that the merchant was accountable for the deceit of his factor, though not criminaliter, yet civiliter, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

I should be very sorry to see a principle which appears to me of so great value shaken by any authority. No treatise on agency that I have ever come across has thrown any doubt on it, and it would be strange indeed if it should be shaken by the decision in *Barwick* v. *English Joint Stock Bank* (1), since that case appears to me a strong authority confirming and strengthening the accuracy of the principle.

Lord Macnaghten. My Lords, in the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long standing and good repute, the appellant, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much, just a mortgage for 450*l.* bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port which she bought herself without legal assistance for 540*l.* after her husband's death. But it was all she had; and after the order of the Court of Appeal reversing a decision in her favour pronounced by Scrutton J., who tried the case with a special jury, she was compelled to appeal to this House as a pauper.

At the date of the transaction which gave rise to this litigation, Mr. Frederick Smith was the sole member of the firm of Grace, Smith & Co. He was a gentleman "devoted," as he says, "to public work," meaning by that, I suppose, that his proper business as a solicitor was a matter of secondary consideration with him. There is no imputation or reflection on

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(1) L. R. 2 Ex. 259.

Lord Macnaghten.

the honour of the firm or on the honesty or honour of Mr. Frederick Smith. The fraud of which Mrs. Lloyd complained was committed by his accredited representative, a clerk in the office, one Sandles, in the course of the business which Mrs. Lloyd had put into the hands of the firm, and which was undoubtedly a solicitor's legitimate business.

Mrs. Lloyd thought Sandles was a member of the firm. He was really conveyancing manager and managing clerk. He conducted the conveyancing business of the firm without supervision. Mr. Smith admits that Sandles was "practically second in command." But in his own department he was in supreme command. He represented the firm to all intents and purposes just as much as if he had been a partner. Mr. Smith says that he never gave away his own authority. In proof of this statement or in connection with it Mr. Smith adds, "I was supposed to be told by Sandles." What he was told or supposed to be told does not appear from the learned judge's notes.

The fraud was committed in January, 1910. It was not discovered until the following April, when Mr. Smith dismissed Sandles for some irregularity, and Mrs. Lloyd's deeds, for which she held a receipt in the name of the firm, were not to be found.

The story of the fraud is this: On January 11, 1910, Mrs. Lloyd called at the office of Grace, Smith & Co. It was her second visit on the business about which she wanted the firm's advice. She had called in the preceding November to make some inquiries about her property. And once before that, when the purchase of the Ellesmere Port cottages was completed, she had been to the office to get her deeds from Grace, Smith & Co., who were the vendor's solicitors. That was all she knew of the firm. On January 11, 1910, she saw Sandles. She was dissatisfied with the return she got from her property. Sandles advised her to call in the mortgage and to sell the Ellesmere Port property. He asked her to come the next day and bring her deeds with her. On the 12th she brought her deeds, and gave the instructions which Sandles had suggested. After some conversation Sandles left the room, taking the deeds with him. He returned in about twenty minutes with one of the clerks and put before her two documents, which he told her to sign. He did not tell her what they were. She did not read them. She signed both without demur or question, believing them, she says, to be something she "had to sign before the houses were sold." It turned out that one was a transfer of the mortgage to Sandles himself, expressed to be in consideration of 450*l.* paid to Mrs. Lloyd. The other was an absolute conveyance to Sandles of the Ellesmere Port property with a receipt for purchase-money in the body of the deed. At the same time he gave her a receipt for her deeds in his own name. She shewed the receipt to a friend, who said it was in an odd form and that she ought to have a receipt in the name of the firm. On the 14th she wrote to say she had changed her mind and wished to cancel her instructions. She went back to the office on the 17th and asked for a receipt for her deeds in the name of the firm. Sandles gave her at once the receipt she asked for.

Armed with the two deeds, executed by Mrs. Lloyd and witnessed by one of the clerks of the firm, Sandles promptly called in the mortgage, transferred it, and disposed of the proceeds in payment of a debt of his own. The conveyance of the Ellesmere Port property he pledged with a bank to which he was indebted.

At the trial the learned judge put a series of questions to the jury. In answer to the first question the jury stated that "in receiving the deeds and taking instructions to sell the property and call in the mortgage debt Sandles professed to act as conveyancing manager to Messrs. Grace, Smith & Co." The other questions were framed to meet a view of the meaning and effect of the well-known decision in *Barwick* v. *English Joint Stock Bank* (1) which no doubt has obtained currency of late but which, I think, is erroneous. The answers to these questions are not of much assistance in deciding the real question at issue. Then the jury added a rider that they were of opinion that "throughout the whole history of the transaction Mrs. Lloyd believed she was dealing with Messrs. Grace, Smith & Co."

It was agreed by the parties that any supplementary finding of fact which it became necessary to decide should be made by the learned judge. Under that agreement the learned judge, as he says, "found as facts that it was within the scope of Sandles' employment to advise clients who came to the firm to sell property as to the best legal way to do it and the necessary documents to execute; that the client did rely on the representations of Sandles professing to act on behalf of the firm that the documents in question were necessary to facilitate and carry out the sale of the land for her; that she did not know that she was signing conveyances to Sandles outside the scope of his employment, and that she was justified in relying on the representation of Sandles without reading and trying to understand the documents tendered to her." That seems to me to be a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency.

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(1) L. R. 2 Ex. 259.

The learned judge thereupon, after consideration, gave judgment for the plaintiff. His decision was reversed by the Court of Appeal (Vaughan Williams L.J. dissenting).

The first line of defence set up by Mr. Smith was that Mrs. Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between Mrs. Lloyd and Sandles. It is enough to say that there is no foundation for this defence. It was negatived by the jury in their answer to the first question and in the rider which they added to their special verdict. Sandles, no doubt, was playing a double game. To Mrs. Lloyd he was Grace, Smith & Co.; to the clerks in the office Mrs. Lloyd's visits were the private visits of a personal friend.

The other line of defence, which found favour with the Court of Appeal, requires more consideration. It was rested on the fact that the fraud was committed, not for the benefit of the firm, but for the benefit of Sandles himself. It was contended that *Barwick's Case* (1) is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal.

Barwick v. *English Joint Stock Bank* (1) is no doubt a case of the highest authority. It was decided in the Exchequer Chamber, and the judgment was delivered by Willes J. But I agree with my noble and learned friend Lord Halsbury that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the Court of Appeal. It decided two things. It decided that the learned trial judge was wrong in nonsuiting the plaintiff. It also decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud, which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded. And I think it follows from the decision, and the ground on which it is based, that in the opinion of the Court a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

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(1) L. R. 2 Ex. 259.

Now it must be remembered that in 1867, when *Barwick's Case* (1) was decided, there was some difference of judicial opinion on the question whether an innocent principal was liable for the fraud of his agent, even when he had received the benefit of the fraud. In *Barwick's Case* (1) the agent committed the alleged fraud, if he did commit it, for the benefit of his principals. It may be that he was indirectly acting for his own benefit. He may have wished to recommend himself to his principals, by astuteness and zeal in their service, or he may have intended to make amends for over-confidence in an impecunious customer; but the direct pecuniary benefit was the benefit of the principals. It must also be remembered that in the then recent case of *Udell* v. *Atherton* (2), by an equal division of the members of the Court, an innocent principal succeeded in retaining the benefit of a fraud committed by his agent. Possibly that case in some measure turned, as *Cornfoot* v. *Fowke* (3) is said to have turned, on a question of pleading, but certainly one learned judge who was in favour of the defendant, though he held strongly that an innocent principal was not liable in an action of deceit for the fraud of his agent, even though he had profited by it, expressed an opinion that there was no form of action in which liability for vicarious fraud could be established against an innocent principal.

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(1) L. R. 2 Ex. 259.
(2) (1861) 7 H. & N. 172.
(3) (1840) 6 M. & W. 358.

It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes J. expressed himself in the language which has been misunderstood. What Willes J. said was this: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes J. does not, I think, say anything of the kind. In a sentence immediately preceding the sentence I have quoted, he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time—a general observation not confined to the case where the principal is a gainer by the fraud.

The question as to the meaning and effect of the ruling of Willes J. may, I think, be best ascertained by reference to a few cases in which some of the learned judges who took part in the decision in *Barwick's Case* (1) delivered opinions.

Of the judges who were concerned in *Barwick's Case* (1), none were more eminent than Montague Smith J. and Blackburn J. They were second only—if they were second—to Willes J. himself. And their views at least are on record.

The first important case in which the ruling in *Barwick's Case* (1) was discussed was the case of *Mackay* v. *Commercial Bank of New Brunswick.* (2) In that case the Judicial Committee reaffirmed the ruling of Willes J. There the fraud was committed for the benefit of the principal. But it was argued by Mr. Benjamin, Q.C., that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent, made within the scope of his authority, even though the principal had not profited thereby. The judgment was delivered by Sir Montague Smith. He observed (1) that their Lordships regarded it as "settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority." He discussed at some length what meaning was to be attached to the expression "the scope of the agent's authority." "There are," says Sir Montague Smith, "some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine . . . . it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried." Then Sir Montague Smith says "The best definition of it . . . . is to be found in the case of *Barwick* v. *English Joint Stock Bank*" (2), and he quotes the words of Willes J., who, after enumerating instances where the principle had been applied, proceeded as follows: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

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(1) L. R. 2 Ex. 259.

(2) (1874) L. R. 5 P. C. 394.

At the conclusion of the judgment, in reference to Mr. Benjamin's argument, his Lordship expresses himself as follows (1): "It is not necessary to determine whether or not the plaintiffs could have retained their verdict if they had proved only that they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby."

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(1) L. R. 5 P. C. at p. 410.

(2) L. R. 2 Ex. 259.

It is difficult to imagine that Sir Montague Smith would have expressed himself in this manner if he had supposed that the question which he reserves had been already determined in the case of *Barwick* v. *English Joint Stock Bank.* (2)

Mackay v. *Commercial Bank of New Brunswick* (3) was decided in 1874; it was followed in 1877 by *Swire* v. *Francis* (4), a case also in the Privy Council. That was a case in which the principal was held liable for the fraud of his agent, though it was committed for the benefit of the agent himself and not for the benefit of the principal. The judgment was delivered by Sir Robert Collier, but Sir Montague Smith was a party to the judgment.

The only other case with which I will venture to trouble your Lordships is the case of *Houldsworth* v. *City of Glasgow Bank* (5), decided in 1880. In that case *Barwick* v. *English Joint Stock Bank* (2), *Mackay* v. *Commercial Bank of New Brunswick* (3), and *Swire* v. *Francis* (4) are referred to at some length, both by Lord Selborne and by Lord Blackburn. Lord Selborne observes, as has been observed in other cases, that the principle on which those cases were decided was a principle not of the law of torts, or of fraud or deceit, but of the law of agency. "The decisions in all these cases proceeded," he said, "not on the ground of any imputation of vicarious fraud to the principal, but because, (as it was well put by Mr. Justice Willes in *Barwick's Case* (2)) 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

Here I must ask your Lordships' particular attention to the

(1) L. R. 5 P. C. at p. 416.
(2) L. R. 2 Ex. 259.
(3) L. R. 5 P. C. 394.
(4) 3 App. Cas. 106.
(5) (1880) 5 App. Cas. 317.

fact that in the passage which Lord Selborne quotes from the judgment of Willes J. as explaining the true ground of decision in *Swire* v. *Francis* (1), as well as in *Barwick's Case* (2) and in *Mackay* v. *Commercial Bank of New Brunswick* (3), the words "and for his master's benefit" are omitted. In the original they follow the words "in the course of his master's business." Unfortunately in the report in 5 Appeal Cases, though the passage is printed as a quotation with inverted commas, the omission is not denoted in the usual way by asterisks. And it seems to have escaped observation. But it is most significant. No one who calls to mind Lord Selborne's extreme accuracy in such matters can doubt that the omission was intentional. If the words omitted had been left standing, the passage would not have been applicable to *Swire* v. *Francis.* (1) In *Barwick's Case* (2) the words are appropriate. In a general statement of the law they are out of place. That this was Lord Selborne's own opinion is evident. On the words as occurring in *Barwick's Case* (2) Lord Selborne makes no comment. When he comes across the same expression in Lord Cranworth's judgment in *Addie's Case* (4) he gives a note of warning. There it is made part of a general proposition. And Lord Selborne says that the words "may perhaps require some enlargement or explanation." That is quite enough to shew that Lord Selborne was not prepared to accept them as an integral part of the proposition which he considered the true ground of decision in *Barwick's Case* (2) and the two cases which followed it, without some qualification.

Lord Blackburn's view of the judgment in *Barwick's Case* (2) requires no explanation. It is clear enough. After referring to *Barwick's Case* (2) he expresses himself as follows (5): "I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This no doubt was a very technical question"; and then come these important words: "The substantial point decided was, as I think, that an

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(1) 3 App. Cas. 106.
(2) L. R. 2 Ex. 259.
(3) L. R. 5 P. C. 394.
(4) (1867) L. R. 1 H. L. Sc. 145.
(5) 5 App. Cas. at p. 339.

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innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."

That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes J. is the best that can be given.

In the case of *Udell* v. *Atherton* (1) Wilde B., afterwards Lord Penzance, in his admirable judgment makes the following observation: "It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. *All* deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal." In the same case, in a passage which was approved apparently by the Court in *Mackay* v. *Commercial Bank of New Brunswick* (2), Martin B. (3) stated the question to be, "Was his" (the agent's) "situation such as to bring the representation he made within the scope of his authority?" In those passages the true principle is, I think, to be found.

The principle as stated by Lord Blackburn is in accordance with the opinion expressed by Story J. I venture to quote Story's opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of Queen's Bench, consisting of

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(1) 7 H. & N. 172, at p. 180.

(2) L. R. 5 P. C. 394.

(3) 7 H. & N. at p. 198.

Cockburn C.J., Blackburn, Mellor, and Lush JJ., by Blackburn J. himself in a case which occurred in the interval between the date of *Barwick's Case* (1) and the decision in *Houldsworth* v. *City of Glasgow Bank.* (2) The passage in the judgment of Blackburn J. as reported in *McGowan & Co.* v. *Dyer* (3) is as follows: "In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in s. 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.'"

I may observe in passing that although Lord Bramwell held strongly the view that for the fraud of an agent committed for the principal's benefit the principal is not answerable, either in an action of deceit or in any other form of action, yet he seems to think that it follows (as indeed it must follow logically) that if liable in that case the principal must be liable in all cases. For he suggests in *Weir* v. *Bell* (4) that instead of imputing vicarious fraud to the principal such cases as *Barwick* v. *English Joint Stock Bank* (1) might be decided on the ground that "every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."

With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1) and by Lord Davey in *Ruben* v. *Great Fingall Consolidated* (2), in reference to the question under discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both.

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(1) L. R. 2 Ex. 259.

(2) 5 App. Cas. 317.

(3) (1873) L. R. 8 Q. B. 141, at p. 145.

(4) (1878) 3 Ex. D. 238, at p. 245.

The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

So much for the case as it stands upon the authorities. But putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite safe in "our" hands. Naturally enough she signs the documents he puts before her without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith, who put this rogue in his own place and clothed him with his own authority? If Sandles had been a partner in fact, Mr. Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner. But that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty; but there are such things as fidelity policies. You can insure the honesty of the person you employ in a confidential situation or you can make your confidential agent obtain a fidelity policy.

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(1) 18 Q. B. D. 714, at p. 718.

(2) [1906] A. C. 439, at p. 445.

With all respect to the learned judges of the Court of Appeal, I think the decision appealed from is wrong. I think they are in error as regards the law, and I think they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs. Lloyd out of her property as if it were an isolated transaction—as a thing standing by itself; whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter of course—a trifling incident in the business about which the firm was being employed.

In the result I am of opinion that Mr. Frederick Smith was clearly liable for the fraud of his agent.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the elaborate and exhaustive judgment which has just been delivered by my noble and learned friend Lord Macnaghten. I concur in every sentence in it, and it so fully expresses the views I entertain on the points in controversy in the case that I think it entirely unnecessary to read the judgment I had myself prepared. I would only add that I hope the decision of your Lordships' House in this case may be the means of correcting the misconception which has for some time prevailed as to the true ground upon which, and the limits within which, a principal may be held responsible for the frauds of his agent.

LORD SHAW OF DUNFERMLINE. My Lords, the defendants, against whom personally no suggestion of a dishonouring kind is made, plead that they are not responsible in law for the conduct of their servant Sandles, which was nefarious, and that in the transactions in question in this case Sandles acted for his own benefit. Lord Macnaghten has in the opinion just delivered narrated the material facts in the suit, and it is quite unnecessary to resume them. With that opinion I entirely agree.

The case is in one respect the not infrequent one of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud. Nor do I think it doubtful that it would be quite unsound in law if this result could be avoided by an investigation of the private motives—in the direction of his own, as distinguished from his master's, benefit—which animated an agent in entering into a particular transaction within the scope of his employment. The bulk of mercantile dealings are not direct, but are conducted through agents vested with an ostensible authority to act for their employers. When the authority is of a limited kind, the person transacting with such an agent is bound to assure himself that the limits are not exceeded,—a familiar instance of which is the case of bills signed per procuration. But when the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.

It is not difficult to discover the legal source of much of the language employed in this case and appearing even in the questions put to the jury. It sprang from two sentences in the judgment of Willes J. in *Barwick* v. *English Joint Stock Bank* (1), a case in which it is too often forgotten that the bank was in the position of having had and received, and of maintaining its right to retain, money paid to it in consequence of a misrepresentation by its agent. For the purposes of the present question the outstanding fact is the very one which is apt to be forgotten, namely, that the misrepresentation was made, and was admitted to have been made, in the interests of the bank as well as by its agent. These two things were conjoined in fact. This being so, in the course of his judgment, Willes J. used the words "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The learned judge was not in this language setting up the necessity for a conjunction of these two things, but was dealing with a case in which admittedly the conjunction had occurred. I am aware of the approval given to this language in subsequent cases, as for instance in *Ruben* v. *Great Fingall Consolidated* (1) by Lord Davey, and in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) by Lord Bowen. If I may respectfully do so, I tender my entire concurrence in the opinion just delivered by my noble and learned friend Lord Macnaghten upon the dicta of Lords Davey and Bowen in these cases. But I do so subject to this—that I cannot bring myself to think that it was ever distinctly meant to be announced or suggested as law that, on the assumption that a person deals with an agent in good faith, and that the conduct of the agent is fully within the scope of his authority, then the principal of that agent is not responsible for the agent's fraud, by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself. That, in my opinion, is not the law. On the contrary, the principal is, in such circumstances, legally responsible for his agent's conduct.

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(1) L. R. 2 Ex. 259.

I incline to the view that in most, if not all, of the cases cited in argument, it will be found upon investigation that the transaction which was in question was in fact not merely for the agent's own benefit, but a piece of conduct beyond the scope of his employment. It was so in the instances cited. And a late and clear instance of this (much founded on at your Lordships' Bar) is *Cheshire* v. *Bailey*. (3)

I refer to the analysis of the decisions in the judgment of Scrutton J., and I add a reference to a somewhat similar analysis in the case of *Hambro* v. *Burnand* (4) by the late Lord Collins,

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(1) [1906] A. C. 439, at p. 445.
(2) 18 Q. B. D. 714, at p. 718.
(3) [1905] 1 K. B. 237.
(4) [1904] 2 K. B. 10.

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then Master of the Rolls. I respectfully give my adhesion, without a further statement on my own part, to the views expressed in these judgments.

In the present case, as I have stated, it has been clearly found that the fraud was committed in the course of, and within the scope of, the duties with which the defendants had entrusted Sandles as their managing clerk. In my opinion, they must in these circumstances stand answerable in law for their agent's misconduct.

I think that the appeal should be allowed and that the action should be disposed of in the same sense as in the judgment of Scrutton J., whose treatment, I desire to add, of the whole case both in law and in fact appears to me to have been correct, and with whose opinion I also respectfully agree.

Order of the Court of Appeal reversed and judgment of Scrutton J. restored. Respondents to pay the costs in the Courts below and also the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, March 28, 1912.

Solicitor for appellant: *Walter C. Broadbridge.*
Solicitor for respondents: *George Thatcher.*

[HOUSE OF LORDS.]

ROBERT MACKENZIE AND ANOTHER . . . APPELLANTS;

AND

GERALDINE ELLEN JOHNSTONE AND WILLIAM JAMES JOHNSTONE FOR HIS INTEREST . . . . RESPONDENTS.

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July 26.

Succession — Testament—Construction—Provision to Widow of "liferent use and enjoyment" of House—Liferent or Occupancy—Incidence of Rates and Burdens.

A testator directed his trustees to give to his widow "the liferent use and enjoyment" of his dwelling-house:—

Held that the right of the widow was a right of liferent, and that she was liable for the proprietor's rates and burdens.

Cathcart's Trustees v. *Allardyce* (1899) 2 F. 326, overruled.

Interlocutor of the Second Division of the Court of Session in Scotland, 1911 S. C. 321, reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling the interlocutor of the Lord Ordinary (1), and from a consequential interlocutor relating to expenses.

The appellants, Robert and Walter Mackenzie, were trustees, with the respondent Geraldine Ellen Johnstone, under the trust disposition and settlement of their brother the late James Whitelaw Mackenzie, dated July 16, 1900. The respondent Geraldine Ellen Johnstone (hereinafter called the respondent) was the widow of the testator and was now the wife of William James Johnstone. She resided at No. 9, Glencairn Crescent, Edinburgh, the residence of her late husband, with the special advice and consent of her present husband, W. J. Johnstone, for all right and interest competent to him in the premises. W. J. Johnstone was also a respondent to this appeal for his interest.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

(1) 1911 S. C. 321.

The substantial question raised by the appeal was whether upon a sound construction of her late husband's trust settlement the respondent was a liferenter of the house in question and as such liable for the feu-duties, proprietor's taxes, and landlord's repairs applicable thereto, or whether she was a mere occupant and therefore free from these burdens.

The testator by his trust disposition and settlement conveyed to his trustees his whole means and estate upon trust for the purposes thereinafter mentioned. The first purpose provided for payment of his debts, deathbed and funeral expenses, and the expenses of executing the trust.

The second purpose provided:—

"That my trustees shall give to my said wife in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house, number nine Glencairn Crescent, Edinburgh, or of such other house as shall at the time of my death be my residence in Edinburgh, and belong to me, together with the whole household furniture and plenishing therein at the time of my death, including books, pictures, linen, china, plate, plated articles and others, without however any obligation upon her to replace articles broken, or perishing with the using; and in the event of the said dwelling-house and the whole or any part of said household furniture and plenishing being sold by my trustees, as they are hereby with consent of my said wife empowered to do, they shall pay to her the annual income of the price or prices obtained therefor during all the days of her life: Declaring that the said liferent provisions shall be for the alimentary use of my said wife and shall not be assignable by her, or affectable by the diligence of her creditors."

The third purpose provided that the trustees should pay to the respondent an annuity of 500*l.* per annum, such annuity being also declared to be alimentary. The fourth purpose provided for payment of certain specific legacies to the appellants. The fifth purpose provided:—

That my trustees shall, in the event of my said wife surviving me, after setting aside the sum of twenty thousand pounds to provide for the foresaid annuity, pay and convey to her one-half of the whole residue and remainder of my means and estate, and shall pay and convey the remaining one-half to my said brother Walter Mackenzie, to the extent of two-thirds thereof, and to my said brother Robert Mackenzie to the extent of one-third thereof; and shall, on the death of my said wife, pay and convey to them in the same proportions, the said dwelling-house and household furniture and plenishing, or, if the same shall have been sold, the prices thereof, and the sum set aside to provide the said annuity, and any surplus revenue accrued thereon."

The testator died on September 10, 1900, and at the date of his death No. 9, Glencairn Crescent was still his dwelling-house. The trustees made up a title in their names to the house and allowed the respondent to take possession of the house and furniture. They also set aside and invested a sum of 20,000*l.* to provide for the annuity payable to the respondent, and they divided the residue of the trust estate between the respondent and the appellants in the manner provided by the settlement. The respondent gave a formal discharge to the appellants in respect of their dealings with the trust estate up to November 10, 1902, including the distribution of the residue. For some years after entering upon possession of the house the respondent paid the feu-duty, proprietor's taxes, and landlord's repairs, but being subsequently advised that the trustees were liable for these payments, she raised the present action against herself and the appellants for declarator that she was entitled to occupy the dwelling-house free of all liability for these burdens, and for repayment by the defenders of the sums so paid by her.

The Lord Ordinary (Lord Guthrie) decided against the respondent, but his decision was reversed by the Second Division of the Court of Session (Lord Dundas, Lord Ardwall, the Lord Justice-Clerk, and Lord Salvesen), who held, first, that on a sound construction of the settlement the respondent was entitled to occupy the house free of all liability for such burdens and repairs, and, secondly, it being admitted that there was a considerable surplus revenue arising from the 20,000*l.* set aside to provide for the respondent's annuity, that the burdens and repairs in question were payable out of that surplus revenue.

In addition to the cases cited below in the argument the

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following cases were referred to in the appellants' case: *In re Betty* (1); *In re Tomlinson* (2); *In re Kingham* (3); *In re Gjers.* (4)

1912. March 14, 15. *M'Lennan, K.C.*, and *John S. Mercer* (both of the Scottish Bar), for the appellants. In the case of a liferent by direct conveyance the burdens here in question would fall on the liferenter—Erskine's Institute, bk. II., tit. ix., ss. 56, 60, 61; Bell's Principles, ss. 1061, 1062— and the interposition of trustees makes no difference: *Campbell* v. *Wardlaw.* (5) The feudal title is not conclusive of the ultimate liability for these burdens: *City of Glasgow Bank* v. *Nicolson's Trustees.* (6) The words "liferent use" or "liferent use and enjoyment" are the proper conveyancing words to describe the right of a liferenter: Juridical Styles, 1st ed., vol. i., p. 152, and succeeding editions; *Morris* v. *Anderson.* (7) The words used in this settlement are therefore apt for the purpose of passing a liferent, and, apart from authority, it was the clear intention of the testator that his widow should bear the burdens in question, because he contemplated an immediate division of the residue. But it is said that the authorities are opposed to this construction. In *Clark* v. *Clark* (8) the words were "the use of my house during widowhood." The word "liferent" does not occur at all and that case is no authority for any other case. In *Rodger's Trustees* v. *Rodger* (9) the widow was to have the liferent use and enjoyment of the house "free of rent, feu-duty, ground-annual, taxes and all other deductions." The widow was there expressly relieved of the burdens, but the Lord President regarded the right of the widow as not a right of tenancy, but a right of liferent use, and his decision would have been different but for the express words of exemption. In *Bayne's Trustees* v. *Bayne* (10) the word "liferent" was used, not in the gift itself but in describing the gift, but the language was different from that used in the present case and was used in a different connection.

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(1) [1899] 1 Ch. 821.

(2) [1898] 1 Ch. 232.

(3) [1897] 1 I. R. 170.

(4) [1899] 2 Ch. 54.

(5) (1883) 8 App. Cas. 641, at p. 650.

(6) (1882) 9 R. 689.

(7) (1882) 9 R. 952.

(8) (1871) 9 Macph. 435.

(9) (1875) 2 R. 294.

(10) (1894) 22 R. 26.

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Moreover, the distribution of the residue in that case, as in *Clark* v. *Clark* (1), was postponed until after the death of the beneficiary. *Cathcart's Trustees* v. *Allardyce* (2) must have been based upon a misapprehension of the effect of the previous decisions and was wrongly decided. What was given there was a liferent use with the ordinary incidents attaching thereto. *Smart's Trustee* v. *Smart's Trustees* (3) merely follows the decision of the Second Division of the Court of Session in the present case. Further, the respondent is barred from relief by having paid the burdens for many years and by having consented to the distribution of the residue on that footing. In any event these burdens ought not to be discharged out of the surplus income of the fund set apart for the annuity, as that has been specifically disposed of by the testator.

Scott Dickson, D.F., and *Constable, K.C.* (with them *W. Lyon Mackenzie*) (all of the Scottish Bar), for the respondents. A gift by means of a trust of income for life in the terms of a liferent is not properly a liferent; it is quite distinct from the heritable right of liferent: Erskine's Institute, bk. II., tit. ix., s. 41; M'Laren on Wills, 3rd ed., vol. i., p. 614; *Ker's Trustees* v. *Justice*. (4) The House is concerned here with an entirely different branch of the law, namely, the construction of a testamentary settlement. The truster hands over the estate to his trustees and gives them the whole administration for the purpose of avoiding difficulties which might arise from the feudal estate of liferent. No doubt, the words occurring in this settlement would be sufficient in a gift inter vivos to make the beneficiary the heritable proprietor, but in this connection those words do not confer a feudal estate of liferent, but a mere right of personal occupancy. The widow has the use and enjoyment of the house for life, but she is not entitled to deal with it as a liferenter. She could not let it, because the truster says that the liferent provisions are to be for the alimentary use of his wife and are not to be assignable. Unquestionably a trust might be so framed that it could only be carried out by the trustees divesting themselves of the liferent, but that is not this case. This case turns upon Scottish law, which in this respect is different from the law of England. In regard to this question there has been a consistent course of interpretation extending over forty years, and it would require a very strong argument to induce the House to say that that view is erroneous. It has become generally recognized, and many trusts must have been framed on that footing. It is said that no provision is made for these burdens in the settlement, but they would be comprised in the words "expenses of executing the trust": *Kirkwood* v. *Kirkwood's Trustees.* (1)

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(1) 9 Macph. 435.

(2) 2 F. 326.

(3) (1911) 2 Sc. L. T. 379.

(4) (1868) 6 Macph. 627.

M'Lennan, K.C., replied.

The House took time for consideration.

July 26. LORD SHAW OF DUNFERMLINE (after stating the second purpose of the trust settlement). The question which arises in this case is whether Mr. Mackenzie's widow (now Mrs. Johnstone) is liable for payment of feu-duty, proprietor's taxes, and landlord's repairs on this house, 9, Glencairn Crescent, Edinburgh.

The expression "my trustees shall give to my said wife in the event of her surviving me during all the days of her life the liferent use and enjoyment of my dwelling-house," is, as was admitted at your Lordships' Bar, a direction in terms which are perfectly apt to give a liferent in the ordinary sense. Even if the question were one of feudal conveyancing, the expression "the liferent use and enjoyment" would appear to be language suitable to express the constitution of a liferent. But, occurring as they do in the course of an ordinary trust settlement, these words are adopted as language familiar for generations in Scotland and used in setting up a liferent. As we were informed at the Bar, they so occur in the Juridical Styles from its earliest edition.

The consequences which attach to such a liferent are also familiar. The subject must be enjoyed salva rei substantia. Upon the subject of annual charges (on the hypothesis that what is really a liferent has been given) there is little ground for dispute. In the language of Erskine (II., ix., 61), "Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented; as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands, which may fall due during the liferent." Mr. More, in his Notes to Stair (ccxv.), puts the proposition simply: "The liferenter is bound to pay all the annual and ordinary burdens, which are exigible from the property liferented by him." And in Mr. Guthrie's edition of Bell's Principles, s. 1061, the language employed is, "The right of the liferenter" (on which the learned editor, Mr. Guthrie, interpolates the parenthesis "unless exempted by the terms of the grant") "is subject to the burden of the public taxes, feu-duties, minister's stipend, etc., during the liferent." An old Report of Fountainhall (3 Brown's Supplement to Morison, p. 33) refers learnedly to the corpus juris upon the subject, and with some quaintness sums up: "And, really, it cannot be thought rational, that the fiar shall bear the burdens imposed intuitu of land, whereof he is not in possession, but debarred by liferenters. Natural equity provides, ut eum sequantur incommoda qui habet commoda; they who reap the emolument ought not to grudge onus ei annexum." I have only cited these authorities because of a somewhat full argument presented to your Lordships' House which appeared at times to suggest that there was doubt in the law of Scotland on the subject of the liferenter's liability. That doubt is without warrant.

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(1) (1912) 1 Sc. L. T. 251.

Nor does it appear to me, my Lords, that there is any foundation for the proposition that the obligations of a liferenter are less or more according as the liferent is a gift direct or is a gift conveyed through the interposition of a trust. There is no decision which sanctions such a distinction. There seems nothing in the form in which the right is conveyed which should alter the obligations attached to the gift; and I do not see my way to hold that considerations as to the possibility, or otherwise, of the liferent being feudalized by infeftment have any bearing upon the topic under consideration. None of the judges in the Courts below took such things into account.

The true and only question is whether a liferent right, to which the obligations that I have mentioned would undoubtedly attach, has been here created, or whether, on the contrary, what Mr. Mackenzie conferred upon his wife was not a liferent, but a mere

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right of occupancy of his house. The respondents maintain that it was the latter. In support of that view they appeal with much force to the series of cases enumerated in the opinion of the learned Lord Ordinary.

One of these cases may be at once put on one side. I refer to the case of *Rodger.* (1) In that case the truster in terms directed and appointed that his widow should "have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground-annual, taxes, and all other deductions." The question, accordingly, of whether the liferenter stood free of these annual burdens was not left—as unfortunately conveyancers in Scotland have too frequently left it—to be determined by implication or inference, but was settled in express terms by the language of the trust deed.

In the case of *Clark* (2), trustees were directed by a testator to give his widow "the use of my house, No. 36, Drummond Place, with the whole furniture and effects contained therein," so long as she remained his widow. The words employed, namely, "the use of my house," were not those usual in the constitution of a liferent. The residue of the estate was not divisible until the widow's death. Lord President Inglis held that "there can be no doubt that the widow, as a mere occupant of the house, has nothing to do with the payment of the feu-duty; and as to the repairs of the house, I do not see what a mere occupant has to do with them either." The case was peculiar in this respect, that the main point of contention seemed to have been as to whether the widow was even liable for tenant's taxes, it being maintained that the true tenants were the trustees themselves. This contention was set aside, and the Court held that the widow was liable in tenant's taxes as occupant, but that, upon a construction of the special terms of the trust deed, her position stopped at occupancy and did not rise to the level of a liferent. As I say, the language of the deed, which was merely to give her the use of the house so long as she remained his widow, was no doubt taken in connection with the fact that the trustees were charged with keeping up the trust, the division of the residue being postponed until the widow's death.

(1) 2 R. 294.

(2) 9 Macph. 435.

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My Lords, I agree with the learned Lord Ordinary in attaching importance to this latter circumstance. It humbly appears to me that, in regard to the question of the incidence and disbursement of charges as charges upon the estate of a trust, it is a consideration of weight that the annual administration is continued and the residue left in hand. On the other hand, it is a cogent consideration in favour of the opposite view, that the residue is in fact distributed and the fund available for disbursements of trust charges is gone. In this latter case it appears to be not an unfair or improper inference that the testator's meaning was that the annual charges referred to should fall to be borne by the person liferented in the property on which they fall.

In the later case of *Bayne* (1) a testator directed his trustees "to make over to" Miss Duckworth "the house at present occupied by me at Craigview aforesaid, together with the whole furniture, etc., therein, and that during all the days of her natural life, and so long as she shall not enter into any marriage after my decease." It will be observed that the word "liferent," although occurring in other parts of the settlement, is not used in the destination itself, nor is the expression employed "liferent use and enjoyment." Lord Young expressed doubts as to the decision, and his leaning to the view "that as the widow gets the whole benefit of the house—not merely to occupy it but to let it if she pleases, the whole costs and charges connected with it should fall on herself." This doubt seems entirely in line with the institutional and other authorities which I have cited. But the Second Division held that the case was ruled by *Clark*. (2) It is plain that there was considerable difference in the expressions used in the respective deeds. In this case also, as in the case of *Clark* (2), the residue only became payable at the death of the liferenter.

Matters, however, advanced a distinct stage further in the case of *Cathcart* (3), where, by an ante-nuptial contract of marriage, the husband conveyed to his wife "the liferent use of any one house he may die possessed of." He died, survived by his wife, and possessed of one house only, and this was burdened to the extent of over two-thirds of its value. It was held that the wife was not liable for the burdens and the landlord's taxes, &c., but that the meaning of the settlement was that the widow had obtained a free gift of the occupation of the house. Lord Young again expressed doubts. Lord Moncrieff held that the decision had to be governed by the preceding cases, and particularly that of *Clark.* (1) The Lord Justice-Clerk decided the case upon its merits in the sense indicated, but held that his view was confirmed by the preceding authorities.

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(1) 22 R. 26.

(2) 9 Macph. 435.

(3) 2 F. 326.

My Lords, with some regret, and fully admitting the difficulties which confronted the learned judges of the Court of Session, I venture to doubt whether the previous authorities, and in particular the case of *Clark* (1), were apt as precedents. In the case of *Cathcart* (2) a liferent in terms was created. In *Clark* (1) it was not so. Nor did the other language in the deeds to be construed in the two cases equate. But if the case of *Cathcart* (2) is treated as an independent authority amounting to a proposition that a person enjoying "the liferent use" of a particular house is not, quoad the obligation attached to such a position, to be treated as a liferenter, then I am humbly of opinion that such a proposition is unsound in law. No reason occurs to the mind for confining the beneficiary to the category of occupant as distinguished from that of liferenter, when the language employed in the settlement or marriage contract is plain and apt as constituting a liferent right. The doubts of Lord Young, expressed more than once, as to the decisions in which he took part seem to me to have been well warranted.

My Lords, it is not necessary in this case to go further and to say whether the cases of *Clark* (1) and *Bayne* (3) were in themselves properly decided, or whether the language and provisions of the deeds there construed were so special as to relieve the beneficiary as a mere occupant from the general obligations of a liferenter. Two propositions of general import may, however, be stated. First, the extent of the obligations attaching to a right of this character conferred by deed or settlement is a question to be determined by the intention of the maker, as that intention

(1) 9 Macph. 435.

(2) 2 F. 326.

(3) 22 R. 26.

can be derived from the language which he has employed and from the provisions which he has made with regard to, inter alia, the administration and realization of his estate. Secondly, when the language employed is entirely apt and appropriate for the creation of an ordinary liferent right, it rests upon those who contend that the ordinary obligations which attach to a liferenter should not apply to him in the particular case—it rests upon those putting forward such a proposition of exception to establish it.

Applying these principles to the present case, I now turn to the provisions of Mr. Mackenzie's settlement. The scheme of that settlement was this: After the ordinary provision for payment of debts, he gave his widow an annuity of 500*l.* and the liferent of the house. With regard to providing the annuity a sum of 20,000*l.* was set apart; and the language in which that was done, and in which the corpus of the estate was disposed of, is of great importance. It is as follows: [His Lordship read the fifth purpose, and continued.] It is accordingly clear that the bulk of the residue of the estate was to be paid and conveyed on the death of the testator to one set of beneficiaries, namely, the testator's widow and brothers in certain proportions.

During the widow's life all that remained undistributed were the house and furniture (or their prices if sold), in which she was liferented, and a sum of 20,000*l.* set aside to provide the widow's annuity. These were to be paid and conveyed at her death to another set of beneficiaries, namely, the testator's brothers alone. Not only, however, was the sum set aside to provide the annuity so to be conveyed to the brothers, but, as was also provided by the settlement, "any surplus revenue accrued thereon." This surplus revenue, my Lords, was surplus after payment of the annuity and nothing else, and the right to every portion of such surplus was and is in Messrs. Walter and Robert Mackenzie. It appears accordingly to be in the highest degree unlikely, and indeed quite contrary to the intention of the testator, that any residue of his estate (thus directed to be paid over at his death) was to be in part reserved so as to provide a fund out of which the taxation upon the property liferented by his widow was to be defrayed. In the second place (and, my Lords, with much respect to the judges of the Second Division, this appears to be particularly clear), the fund of 20,000*l.* was a fund which, along with the surplus of revenue which remained after defraying Mrs. Mackenzie's annuity year by year, went to Messrs. Walter Mackenzie and Robert Mackenzie; and to divert it, or any part of the annual surplus, to other purposes or to other people seems a plain breach of the duty resting upon the trustees, and of the rights of Messrs. Walter and Robert Mackenzie under their brother's settlement. I cannot see my way to hold that an encroachment upon this fund so specifically destined can be made for the purpose of payment of taxation by Mr. Mackenzie's trustees upon the house liferented by his widow. The judgment of the Second Division, holding that it is legitimate to dedicate any portion of the 20,000*l.* and surplus revenue thereon to the payment of such taxation, appears to me to be contrary to the provisions of the deed.

Accordingly, my Lords, the residue is, in terms of the settlement, distributed, and the 20,000*l.*, with the entire surplus revenue therefrom, is specially destined to particular beneficiaries. My Lords, that being so, and the problem being, "Did Mr. Mackenzie intend that his trustees should pay these annual charges or that his widow should pay them?" I think the problem is plainly solved by these two considerations: first, that, if he intended the former, he has left no fund which it would be reasonable to think he assumed could be dedicated to, or utilized for, that purpose; whereas, on the contrary, if his intention was that his widow should pay these charges, there was nothing out of the common in that; he was simply presuming what the law of Scotland would in ordinary circumstances lay down, namely, that she, as liferenter, should have the rights and perform the obligations attaching to such a position.

There is, however, another point which humbly appears to me to shed no inconsiderable light upon the testator's intentions, a point which does not appear to be adverted to in the Courts below. The trustees had power, with the consent of the widow, to sell the house. What, in the event of such a sale, was to happen? She was to be entitled to "the annual income of the price or prices obtained therefrom during all the days of her life." It is clear that the price obtained for the property was a price which would be realized on the footing that feu-duty, landlord's taxation, and all the charges now in question in this case were on the debit side of the property account as a revenue-yielding subject. The widow accordingly, it is provided by the settlement, shall in the event of a sale be truly and in the result debited with this taxation. If, however, there be no sale she is not to be debited with that taxation, but it is to be disbursed,—so is the contention,—out of the general residue, or out of the revenue of 20,000*l.* specifically destined to the testator's brothers. It would appear to be much more reasonable and in accord with the intention of the testator to make the incidence of the taxation where the general law would put it, namely, as a debit against the property and its fruits or their equivalent, a debit to be borne by the liferenter in either case, namely, whether the property was sold or remained unsold.

Although the result has been reached in some respects upon a broader ground than that taken by the Lord Ordinary, I am of opinion that that learned judge came to a correct conclusion in this case, and that, whether upon the point of the possible dedication of the annuity funds and surplus to the payment of these charges, or upon the point of the effect of the authorities as governing a case of this kind, the decision of the learned judges of the Second Division cannot be supported.

I am humbly of opinion that the appeal should be sustained and that the appellants are entitled to costs in both Courts.

LORD ATKINSON. My Lords, I concur.

LORD MACNAGHTEN. My Lords, I agree.

Interlocutors of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored; the respondents to pay the costs in the Courts below and of the appeal to this House.

Lords' Journals, July 26, 1912.

Agent for appellants: *John Kennedy, W.S., for Cumming & Duff, S.S.C., Edinburgh.*

Agents for respondent: *Long & Gardiner, for Bonar, Hunter & Johnstone, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* FLORENCE DEELEY . . . . APPELLANT;

1912

AND

July 26. LLOYDS BANK, LIMITED . . . . RESPONDENTS.

Mortgage—Priority—Mortgage to Bank to secure Current Account—Subsequent Mortgage—Notice—Appropriation of Payments—Rule in Clayton's Case.

G. mortgaged his business premises, first, in 1893, to a bank to secure an overdraft on his current account limited to 2500*l.*, and, secondly, in 1895, to D. to secure 3500*l.*, and the second mortgage was expressed to be subject to the first. Notice of the second mortgage was given to the bank on the date of its execution, but they continued the account as one unbroken account instead of opening a fresh account. G. from time to time made payments into his account which, if applied according to the rule in *Clayton's Case*, would have paid off the moneys due to the bank at the date of the second mortgage by January 8, 1896. The bank had forgotten about the notice, and D. and her husband, who had the management of her business affairs, believed that the mortgage to the bank was a continuing security in priority to D.'s; and the account was dealt with on this footing. The bank never allowed G. to overdraw beyond the secured amount except temporarily on deposit of fresh security. On several occasions D. authorized her husband to deposit her mortgage with the bank to secure G.'s account. In 1896 and 1897 G. frequently made specific appropriations of payments into his account without any alteration being made in the form of the account as shewn by the pass-books. In June, 1899, the bank realized their security for a sum just sufficient to pay the amount due to them and retained the proceeds of sale, and in the same year G. was made bankrupt. D. at that time made no claim to priority, and her husband induced the bank to give up a claim under a collateral guarantee given to them at the time of their mortgage, on the representation that the discharge of the mortgage put an end to the guarantee; and thereupon D. obtained a release of a counter guarantee which she had given to the guarantor.

In April, 1905, D. commenced an action against the bank for the usual accounts as against a mortgagee in possession, and for a declaration that in taking these accounts they were not entitled to charge for advances made to G. after notice of the mortgage to D.:—

Held, that the rule in *Clayton's Case* (1816) 1 Mer. 572, was not excluded by the conduct of the parties, and that by the conjoint operation of that rule and the principle of *Hopkinson* v. *Rolt* (1861) 9 H. L. C. 514, D.'s mortgage was entitled to priority.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

LORD ROBSON was present during the argument, but was prevented by illness from taking part in the judgment.

Decision of the Court of Appeal [1910] 1 Ch. 648, reversed.

APPEAL from an order of the Court of Appeal affirming a judgment of Eve J. (1)

The question raised by this appeal was whether the respondents, Lloyds Bank, Limited, in whose favour a mortgage had been executed by their customer, John Glaze, to secure his current account, were entitled as against the appellant, a subsequent mortgagee, to hold their mortgage as security for moneys becoming due to them from the mortgagor after they had received notice of the appellant's mortgage; and this question turned upon the question whether the respondents' mortgage had been discharged by the operation of the rule in *Clayton's Case*. (2)

The appellant was the wife of Frank Deeley, a solicitor, of Dudley, and the sister of John Glaze. Frank Deeley acted as solicitor to John Glaze in the transactions which led to this litigation, and he also acted as the agent of his wife, who left to her husband the entire management of her monetary affairs.

In 1891 John Glaze acquired certain freehold ironworks at Brierley Hill, Dudley, known as the Brockmoor Steel and Iron Works, where he carried on the business of an ironfounder, and by an indenture of mortgage dated August 28, 1891, he mortgaged these works to T. Rollason and R. Meiklejohn to secure 2500*l.* and interest at 4½ per cent.

In 1892 John Glaze opened an account with the respondents' Dudley branch. It was agreed that the bank should allow him an overdraft of 1000*l.* upon certain securities; and in the following year it was agreed that the bank should allow him a further overdraft of 2500*l.* upon a mortgage of the Brockmoor Works. By an indenture of mortgage dated September 21, 1893, and made between John Glaze of the one part and the respondents of the other part, John Glaze covenanted with the respondents that he would on demand, or if no demand was made in his lifetime then his heirs, executors, or administrators would on his death, pay to the respondents the balance then owing on his account current with the respondents for cheques, notes, or bills drawn, accepted, or indorsed by him or for advances made to him for his accommodation or benefit or otherwise howsoever, including interest with half-yearly rests, commission, and other customary charges, and would also pay interest on such balance from the date of such demand or death (as the case might be) at the rate of *5l.* per cent. per annum. Then followed a conveyance of the Brockmoor Works to the use of the respondents in fee simple, subject to the first mortgage, and subject to a proviso for redemption on payment of all moneys by the now stating mortgage covenanted to be paid; and the mortgage contained a proviso that the amount to be thereby secured should not exceed the sum of 2500*l.*

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(1) [1910] 1 Ch. 648. (2) 1 Mer. 572.

By an indenture of mortgage dated October 19, 1895, and made between John Glaze of the one part and the appellant of the other part, John Glaze mortgaged the Brockmoor Works and certain book debts to the appellant to secure the sum of 3500*l.* and interest at 10 per cent., and this mortgage was expressed to be subject, in the case of the Brockmoor property, to the first and second mortgages above referred to. This mortgage was not in fact executed until December 2, 1895, and on that day notice thereof was duly given on behalf of the appellant to the respondents.

At the close of December 2, 1895, there was, as appeared by the bank pass-books of John Glaze, a debit balance of 3379*l.* odd on his current account with the respondents, which was secured to the extent of 2500*l.* by the respondents' mortgage, and for which the respondents held other securities valued by them at 3580*l.* John Glaze continued to pay in moneys to the credit of his current account, and between the close of December 2 and the close of December 21, 1895, these payments amounted to 2657*l.* odd, which more than extinguished the amount secured by the respondents' mortgage. Between December 21, 1895, and the close of January 7, 1896, further sums to the amount of 801*l.* odd were paid in to the credit of his current account, and that sum with the sum previously paid in more than extinguished the total debt of John Glaze to the respondents on December 2, 1895.

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On March 23, 1899, the respondents, having in the meantime taken a transfer of the first mortgage, entered into possession of the Brockmoor Works, and on June 6, 1899, they sold the property under their power of sale for 5500*l.* The whole of the purchase-money was retained by the respondents, who claimed to apply it (with the exception of a small sum of 37*l.*) in satisfaction of the amount alleged to be due to them under the first and second mortgages respectively.

On December 7, 1899, John Glaze was adjudicated a bankrupt. No dividend had been paid in respect of his estate and the whole of the principal sum of 3500*l.* due under the appellant's mortgage remained due to her.

On April 29, 1905, the appellan commenced an action against the respondents claiming (among other things) the usual accounts as against a mortgagee in possession, and a declaration that in taking these accounts the respondents were not entitled to charge for advances made by them to John Glaze after they had notice of the third mortgage. The respondents by their amended defence denied that they had received notice of the appellant's mortgage on December 2, 1895, or at any date prior to November 22, 1898. George Wilkinson, who was the manager of the respondents' Dudley branch at the date of the execution of the appellant's mortgage and for some considerable time afterwards, was called by the respondents and stated that he had no recollection of having received notice of the mortgage on December 2, 1895. The Court, however, came to the conclusion that his memory was defective as to this and found as a fact that the notice was received by him on that date. The respondents also alleged that the moneys secured by the appellant's mortgage in fact belonged to Frank Deeley and that the appellant was a bare trustee of the mortgage for her husband. No money passed on this mortgage, which was mainly to secure past advances paid by Frank Deeley to the credit of John Glaze's account. Frank Deeley and the appellant, however, swore that these moneys came from the appellant's estate and were lent by the appellant to her husband. The Court, in substance, accepted their evidence and found that the allegations of the respondents were not proved.

The two remaining defences to the action, so far as material to this appeal, were in substance (*a*) that the facts of the case were inconsistent with the existence of any intention on the part of the respondents to appropriate in accordance with the rule in *Clayton's Case* (1) the sums paid to the credit of the secured account after the date of the appellant's mortgage, and that consequently that rule was excluded; (*b*) that the appellant by her own acts and the acts of her husband was precluded from claiming any priority over the respondents' mortgage.

The facts relevant to these issues were as follows:—John Glaze, who was continually in need of money to carry on his business, frequently applied through Frank Deeley to the respondents, both before and after the execution of the appellant's mortgage, to allow him to increase his overdraft, but the respondents throughout refused to allow him any further accommodation beyond the secured amount of 3500*l.* except upon additional security, and the debit balance continued at all times to stand approximately at that figure. On the few occasions when the overdraft was substantially exceeded additional temporary securities were deposited with the respondents. It was vital to the interests of the appellant and Frank Deeley that the business of John Glaze should be kept going, and from time to time Frank Deeley made very large advances to John Glaze to secure this object. During the year 1896 he paid in sums amounting in the aggregate to over 3600*l.* to the credit of John Glaze's account to enable the account to be drawn upon, and on four or five occasions the appellant allowed her husband to deposit her mortgage with the respondents as security for that account. Between August, 1896, and January, 1898, numerous sums were paid in by John Glaze to his account by slips appropriating those sums to particular payments without any reference being made thereto in the bank's ledger or pass-book. The manager, however, protested against this course and ultimately refused for the future to accept money from him as special provision for particular payments and insisted that all moneys should be paid in to his general account in the ordinary way. In 1900 the respondents delivered to the appellant an account of the proceeds of the sale of the mortgaged property shewing the retention by them of 2500*l*. in satisfaction of their mortgage, but neither then nor at any time prior to the issue of the writ in the action did the appellant make any claim that her mortgage had priority over the respondents'. Contemporaneously with the execution of the respondents' mortgage Thomas Glaze, a brother of John Glaze, gave a guarantee to the respondents for 2000*l*., on the terms that the appellant should indemnify him against one moiety of his liability thereunder, and the appellant gave to Thomas Glaze a counter guarantee for 1000*l*. After the sale of the Brockmoor Works the secured account of John Glaze still shewed a debit balance, which the respondents claimed to recover from Thomas Glaze under his guarantee. This guarantee was not produced. Frank Deeley, by representing to the respondents that this guarantee was collateral to their mortgage and that the discharge of the mortgage had put an end to the guarantee, induced the respondents to abandon their claim, and the appellant was released from her guarantee to Thomas Glaze. Throughout all these transactions Frank Deeley, who was ignorant of the rule in *Clayton's Case* (1), believed that the respondents' mortgage was a continuing security for the balance of John Glaze's account in priority to the appellant's mortgage and acted on that belief.

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(1) 1 Mer. 572.

In these circumstances the learned judge held that the rule in *Clayton's Case* (1) did not apply because, having regard to the numerous specific appropriations by John Glaze and to the fact that the account was always kept in the same way, he ought not to presume that the respondents appropriated payments in to debit items in regular succession according to the rule. He accordingly held that the respondents' mortgage was entitled to priority. This judgment was affirmed by the Court of Appeal by a majority (Fletcher Moulton and Buckley L.JJ., Cozens-Hardy M.R. dissenting) principally on the ground that the conduct of the parties was such as to exclude the application of the rule in *Clayton's Case*. (1)

1912. Feb. 15, 16, 19, 20. *P. O. Lawrence, K.C.*, and *Buckmaster, K.C.* (*Sheldon* with them), for the appellant. The

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(1) 1 Mer. 572.

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appellant's case depends upon the combined application of the rule in *Clayton's Case* (1) and the rule laid down by this House in *Hopkinson* v. *Rolt.* (2) The rule in *Clayton's Case* (1) as applied to banker and customer is that where a current account is kept by a bank and communicated to the customer, in the absence of any specific appropriation by either party, the payments are appropriated according to the priority in order of the entries on the one side and on the other of the account. Until the account is communicated to the customer the bank continues to have the option of applying the several payments as it thinks fit, but after communication, by means of a pass-book or otherwise, the bank cannot resile from the mode of appropriation laid down in *Clayton's Case* (1): *Simson* v. *Ingham.* (3) The rule in *Clayton's Case* (1) is a fixed rule of evidence and is applied without regard to what effect it may have upon the parties. *Hopkinson* v. *Rolt* (2) establishes that a mortgage by a customer to a bank to secure his current account is not entitled to priority over a subsequent mortgage in respect of moneys becoming due to the bank after the bank has received notice of the subsequent mortgage. In this case the Court has found that the respondents received notice of the appellant's mortgage on the date of its execution. But instead of closing their customer's account and opening a new account, as they ought to have done if they wished to preserve their security, they continued the current account as one unbroken account. The result is that by the application of the rule in *Clayton's Case* (1) the total balance due to the respondents on their customer's current account on December 2, 1895, the date when the notice was given, was, as between the respondents and the appellant, wiped out on January 7, 1896, and their mortgage was discharged. The appellant's mortgage is therefore entitled to priority, and the moneys received from the sale of the mortgaged property ought to be applied, first, in payment of the first mortgage, secondly, in payment of the appellant's mortgage, and, lastly, in payment of the respondents' mortgage. The joint operation of *Clayton's Case* (1) and *Hopkinson* v. *Rolt* (2) was much debated in *London*

(1) 1 Mer. 572.
(2) 9 H. L. C. 514.
(3) (1823) 2 B. & C. 65.

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and County Banking Co. v. *Ratcliffe* (1), which is on all fours with the present case. There is no case where the rule in *Clayton's Case* (2) has not been applied to a current account kept as one continuous account. The rule applies also to Scotland: *Union Bank of Scotland* v. *National Bank of Scotland.* (3) In *City Discount Co.* v. *McLean* (4), *The Mecca* (5), and *Henniker* v. *Wigg* (6), where the rule was not applied, the circumstances were very special, and those cases have no bearing on the present case. Eve J. inferred from the subsequent specific appropriations by the customer, coupled with the fact that the respondents in form kept the account as before, that this account was not at the material dates an ordinary banker's account to which the rule in *Clayton's Case* (2) applied, but this view was not adopted by the Lords Justices, who proceeded on the view that the rule was excluded by the conduct of the parties, and there is no ground for the inference drawn by the learned judge. As regards conduct, no doubt, both Frank Deeley and the respondents believed that the respondents' mortgage was entitled to priority and acted on that assumption throughout. Frank Deeley acted under a mistake of law, but that did not constitute an estoppel on the part of either the appellant or her husband: *Eaglesfield* v. *Marquis of Londonderry.* (7) [They also referred to *In re Hallett's Estate* (8) and *West* v. *Williams.* (9)]

Astbury, K.C., and *Stamp*, for the respondents. The rule in *Clayton's Case* (2) is a rule of evidence of intention. It lays down that in the case of a banking account, in the absence of any other evidence of intention, the parties must be presumed to have intended that the earliest payments in should be applied in discharge of the earliest items on the debit side; but the rule has always been applied in the furtherance of justice, and no case can be found where it has been applied for the purpose of giving a third party a fortuitous advantage which neither the third party nor the bank nor the customer ever contemplated. The only evidence in favour of the appellant's claim to priority is the evidence of the pass-books, but the pass-books must be looked at as a whole, and, having regard to the persistent refusal of the bank, both before and after the execution of the appellant's mortgage, to allow the secured overdraft to be exceeded except upon the deposit of further securities, and to the numerous specific appropriations by the customer without any alteration in the form of the account as shewn by the pass-books, they afford no evidence that at any particular time the account was kept in such a way as that the rule in *Clayton's Case* (1) would apply. That rule only applies unless it is proved expressly, impliedly, or inferentially that the parties had a different intention. Appropriation depends upon intention actual or presumed, and here all the facts of the case are inconsistent with an intention to appropriate according to the rule in *Clayton's Case.* (1) Throughout the whole period the appellant and Frank Deeley and the respondents intended that the account of the customer should remain a secured account on the faith of the respondents' mortgage keeping its place, and the appellant and her husband recognized the respondents' priority by obtaining a release of the guarantee. No distinction for this purpose can be drawn between the appellant and her husband, who had the absolute control and management of her business affairs. The special circumstances of this case are such as to exclude the prima facie inference to be drawn from the account being kept in the ordinary way. This case falls within the principle of *Henniker* v. *Wigg* (2), *City Discount Co.* v. *McLean* (3), and *The Mecca.* (4) It is said that delivery of the pass-book to the customer is notice that the bank has appropriated under the rule in *Clayton's Case* (1), but it is submitted that that only applies where there has been a change of parties. That occurred both in *Clayton's Case* (1) itself and in *Simson* v. *Ingham* (5), and this circumstance is alluded to by Bramwell B. and Blackburn J. in *City Discount Co.* v. *McLean.* (6) *Hopkinson* v. *Rolt* (7) has nothing to do with *Clayton's Case.* (1) It lays down the principle that the holder of a mortgage expressed to be for a sum certain

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(1) (1881) 6 App. Cas. 722.
(2) 1 Mer. 572.
(3) (1886) 12 App. Cas. 53.
(4) (1874) L. R. 9 C. P. 692.
(5) [1897] A. C. 286.
(6) (1843) 4 Q. B. 792.
(7) (1875) 4 Ch. D. 693.
(8) (1880) 13 Ch. D. 696.
(9) [1899] 1 Ch. 132.

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(1) 1 Mer. 572.

(2) 4 Q. B. 792.

(3) L. R. 9 C. P. 692.

(4) [1897] A. C. 286.

(5) 2 B. & C. 65.

(6) L. R. 9 C. P. at pp. 698 and 701.

(7) 9 H. L. C. 514.

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and for further advances cannot, after receiving notice of a subsequent mortgage, increase the burden of his charge as against the subsequent mortgagee. That principle, however, does not apply to a mortgage in the form in which the respondents' mortgage is in the present case. *London and County Banking Co.* v. *Ratcliffe* (1) is relied on by the appellant as establishing her claim to priority, but that case is distinguishable because there no evidence was tendered of any fact from which an inference could be drawn of any intention to appropriate contrary to the rule in *Clayton's Case* (2), and the application of the rule in that case was in furtherance of the ends of justice.

P. O. Lawrence, K.C., in reply. There is here no evidence of any bargain that the respondents' mortgage should retain its priority, and no question of priority was raised between the parties. Nor is there any conduct on the part of Frank Deeley which would warrant the inference that he, as agent for the appellant, had given up the priority which she had gained on January 7, 1896. [He referred to *Polak* v. *Everett* (3), *Taylor* v. *Bank of New South Wales* (4), and *Ward* v. *National Bank of New Zealand* (5) with reference to the release of the guarantee.]

Astbury, K.C., in reply on the further cases.

The House took time for consideration.

July 26. LORD ATKINSON. My Lords, the facts in this case are, in the main, not in dispute. It is upon the proper inference to be drawn from them that the controversy arises.

One John Glaze, the owner of ironworks at Brierley Hill, Dudley, called the "Brockmoor Works," which were valued at a high figure and of which he apparently entertained high hopes, executed three mortgages of these works. The first was dated August 28, 1891, for 2500*l.*; the second September 21, 1893, for 2500*l.*; and the third October 19, 1895, for 3500*l.* The first of these mortgages was, on March 22, 1899, assigned to the respondents, and this litigation is not concerned with it.

(1) 6 App. Cas. 722.
(2) 1 Mer. 572.
(3) (1876) 1 Q. B. D. 669.
(4) (1886) 11 App. Cas. 596.
(5) (1883) 8 App. Cas. 755.

Glaze was a customer of the local branch of the respondent bank, of which one George Wilkinson was the manager.

From a copy of Glaze's pass-book, printed in the appendix, it appears that on December 31, 1892, there was a debit balance against him of 687*l.* 6*s.* 10*d.*, and on June 30, 1893, a similar balance against him of 920*l.* 8*s.* 3*d.* To secure this current account to the amount of 2500*l.* Glaze granted to the bank the second mortgage, which I shall refer to as the Bank mortgage. It contained a covenant by Glaze that the mortgagor would pay to the respondents on demand, or, if no demand should be made in his lifetime, that his representatives would pay upon his death, the balance then owing by him on his current account with them for cheques, notes, or bills drawn, accepted, or indorsed by him or for advances made to him or for his accommodation or benefit or otherwise howsoever, with interest with half-yearly rests, commission, and customary charges. I concur with the Master of the Rolls in thinking that this was an ordinary bank mortgage to secure a current account. From first to last Glaze's account with the bank was kept as an ordinary current account, balances being struck half-yearly on June 30 and December 31 in each year. The pass-book, duly posted up from time to time, was sent to Glaze, who returned it without objecting to the form the account took.

Owing to some mistake, which was not explained, and, if the business of the branch had been conducted with ordinary care would appear to be inexplicable, this mortgage was for some time taken by the bank to be a security for the whole of Glaze's overdraft, then amounting to between 3000*l.* and 4000*l.*, and not for the amount plainly stated in it in so many words, namely, 2500*l.*

The debit balance against Glaze on June 30, 1895, amounted to 3872*l.* 1*s.* 8*d.*

The third mortgage, though dated on October 19, 1895, was not executed till December 2 following. It was a mortgage from Glaze to Mrs. Deeley, his sister, for 3500*l.* It included, in addition to the Brockmoor premises, all the book debts due to Glaze, amounting nominally to between 2000*l.* and 3000*l.* Frank Deeley, the husband of Mrs. Deeley, who was Glaze's solicitor, gave on that day notice to the local bank of the execution of this mortgage. I am utterly unable to understand the insinuations which have been made against this man because of his having given this notice. It would rather appear to me that it was his duty, not only to himself and his wife, but to the bank, to give the notice if the mortgage to his wife was a genuine and honest transaction. He knew that Glaze owed a large sum to the bank, and to conceal from them under these circumstances the fact that their debtor was encumbering or disposing of his property would, I think, have been anything but straightforward or worthy conduct. He swore distinctly that he knew nothing about *Clayton's Case* (1) or *Hopkinson* v. *Rolt* (2) or the principles laid down in them; so that if this be true he could not have given the notice for the purpose of acquiring priority for his wife's security over that of the bank. A debit balance stood against Glaze in the bank books on December 31, 1895, amounting to 3449*l.* Mr. Lawrence has however, made it plain on the figures that if the debit items entered in the accounts after December 2, 1895, the date of the receipt of the notice, be disallowed on the principle of *Hopkinson* v. *Rolt* (2), and the payments alone taken into account, then, as against Mrs. Deeley, Glaze's debt to the bank was, on January 6, 1896, discharged, and, at least as far as figures go, her mortgage, as he contends, has prima facie acquired priority over the mortgage to the bank.

The bank must have been fully aware of the effect on their security of the receipt of notice of the existence of a security of a later date than their own. And the manager, Wilkinson, must have fully known what was his duty with respect to such a notice, for he produced in the witness-box a copy of the bank's rules for branch managers, of which the fourteenth runs as follows: "Wherever notice is received of a second mortgage or second charge on any security on which the bank holds a prior charge, the account must at once be ruled off and a separate account opened for subsequent transactions." This rule he said was acted upon in his branch.

Glaze's account was not so ruled off. No new account was

(1) 1 Mer. 572.

(2) 9 H. L. C. 514.

opened; on the contrary, to use Wilkinson's own words, it "was kept as a continuous current account" from the date of the mortgage to the bank downwards; and the reason why it was so kept was obvious. Mr. Wilkinson, whose memory was said to be defective, forgot all about the notice. No entry of the receipt of it was ever made in any of the books of the bank; no record kept of it. At the trial he stoutly denied that he had ever received it, and relied upon the fact that he had kept the account as a continuous account, and not as directed by his rules, as corroboration of his statement, circumstantial proof that he never had received the notice at all. If he had been right in his impression, the appropriation of the earlier payments to discharge the earlier debts, on the principle laid down in *Clayton's Case* (1), could not prejudice in any way the interest or defeat the right of the bank—their security being, as it was, a continuing security; and the fair inference to be drawn from Wilkinson's having kept Glaze's account as he did keep it is, that, owing to his having forgotten all about the notice, he intended to appropriate the payments made by or on behalf of Glaze as he has appropriated them.

In addition, Glaze, in the month of August, 1896, commenced to make specific appropriation of his lodgments with the bank. This continued down to January 13, 1898.

The appropriations in that period amounted in number to 134 or 136. On January 21, 1897, and January 12 and 13, 1898, Wilkinson wrote to Glaze three letters containing the following passages respectively:—On January 21, 1897, "Your memorandum is altogether unsatisfactory. Let me again remind you that the bill for 67*l.* 4*s.* has to be withdrawn. The excess in the account and the last half-year's charges have to be paid at once, and I have to inform you that we cannot take special provision for cheques especially while your former promises are unfulfilled." Then he wrote on January 12, 1898, "Your account being conducted in such an irregular manner causes great confusion in our books, and I give you notice that I cannot in future accept any special provision for your transactions. The account must be conducted on ordinary lines in future. The charge for the past year must be paid to the bank." The passage from the next letter runs: "Although I wrote you yesterday as to special provision for cheques, you send a similar transaction to-day. I cannot accept the money as special provision, and if you send further instructions of the same kind it will be returned to you."

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(1) 1 Mer. 572.

These three letters, he said, were his protests against the making of special provisions; and he further stated that, by the words "the account must be conducted on the ordinary lines," he meant the paying of sums in so as to be put to the general account; and, further, that, up to the time Glaze began making special provisions, he had paid the money in to the general credit of the account, crediting the payments in their order of date, as he always did in current accounts. There could be no more direct refusal than this to permit the debtor to appropriate his payments as he wished, and no more emphatic assertion than this of the creditor's intention to appropriate them as he, the creditor, wished. Well, the mode in and by which the creditor in this case carried out his intention was to appropriate them in a way which has been held to disclose, prima facie at all events, an intention to apply the earlier payments to discharge the earlier debits. No record was kept in any of the books of the bank of those special appropriations by Glaze. The current account is kept as if no such special appropriations had ever been made. Mr. Astbury, for the respondents, makes the strangest use of these negligent omissions on the part of Wilkinson. He contends that it establishes that the mode in which the account was kept before the special appropriations commenced, as well as after they had ended, cannot be taken as any indication whatever of an intention on Wilkinson's part to deal with the payments during either of those periods on the principle laid down in *Clayton's Case*. (1) I am quite unable to follow this line of reasoning. If it were sound it would lead to this strange result, that it would only be necessary for a creditor to omit all notice of a debtor's special appropriation in a current account to rebut the inference that is prima facie to be drawn from the fact of keeping accounts at a date anterior to the appropriation as current accounts.

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(1) 1 Mer. 572.

In *Clayton's Case* (1) the Master of the Rolls is reported to have spoken thus: "If appropriation be required, here is appropriation in the only way the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished. If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers,—'Leave this balance altogether out of the running account between us,'—or,—'Always enter your payments as made on the credit of your latest receipts, so that the oldest balance may be last paid.' Instead of this, he receives the account drawn out, as one unbroken running account. He makes no objection to it,—and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation." *Bodenham* v. *Purchas* (2) and *Simson* v. *Ingham* (3) are to the same effect. In *Bank of Scotland* v. *Christie* (4), the two surviving partners of a firm of three continued after the death of the third to deal with their banker in the same way as theretofore, no arrangement having been made to keep separate in the accounts the balance due to the bank at the death of this partner. At a certain date the payments made after the death of the partner balanced the debt due by the firm at the time of his decease. It was held that the separate estate of the deceased partner was by this payment discharged. The Lord Chancellor (Lord Cottenham) is reported, at p. 228 of the report, to have expressed himself thus: "Such payments" (i.e., payments subsequent to the partner's death) "having been made without any appropriation by the parties paying, and having been carried by the partners receiving such payments to the account kept by them, consisting of the old and new transactions, and constituting, therefore, a continuing account, and from which appropriation it was not competent for the bank to remove such payment at a

(1) 1 Mer. 572, at p. 610.
(2) (1818) 2 B. & Al. 39.
(3) 2 B. & C. 65.
(4) (1840) 8 Cl. & F. 214.

subsequent time when the consequences were seen; as was decided in *Bodenham* v. *Purchas*." (1)

In *Sherry's Case* (2) Lord Selborne thus states the rule in *Clayton's Case* (3): "The principle of *Clayton's Case* (3) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to that account, and the effect of that is, that the payments are de facto appropriated according to the priority in order of the entries on one side and the other of that account. It is, of course, absolutely necessary for the application of this doctrine that there should be one unbroken account, and entries made in that account by the person having a right to appropriate the payment to that account."

It is no doubt quite true that the rule laid down in *Clayton's Case* (3) is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied. This was much insisted upon by the respondents; and the decisions in *Henniker* v. *Wigg* (4), *The City Discount Co.* v. *McLean* (5), and *The Mecca* (6) were relied upon to shew that according to the principle laid down in them Wilkinson could not be taken to have intended that the rule in *Clayton's Case* (3) should apply to Glaze's current account. The facts of each of these cases were very special. In the first a bond, not on its face a continuing security, was given by the several obligors to a bank as security for the debt of one of them. The statements and acts of the parties clearly shewed that the bond was intended to be a continuing security. To have applied the rule in *Clayton's Case* (3) would, under the circumstances of the particular case, have defeated the common object of all the parties.

In the second case, though long debtor and creditor accounts were furnished by the creditor to the debtor, including amongst their items the original guaranteed advance, a balance being struck from time to time, yet, on the face of these accounts, it was shewn that the credit items consisted to a large extent of trade bills, and, to a very considerable extent, of the amounts, less discount and commission, of accommodation bills discounted by the bank for the debtor, many of these bills being current when the balance was struck, while the debit items included such of the bills as were dishonoured. Several of the bills were renewed at maturity, when the same system of debiting and crediting was adopted. The actual indebtedness of the customer always exceeded in amount the advance made by the bank on the security.

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(1) 2 B. & Al. 39.

(2) (1884) 25 Ch. D. 692, at p. 702.

(3) 1 Mer. 572.

(4) 4 Q. B. 792.

(5) L. R. 9 C. P. 692.

(6) [1897] A. C. 286.

At p. 699 of the report, Bramwell B., as he then was, is reported to have said: "They contemplated an advance of 5000*l.*, and that the debt might continue for two years unpaid and unsatisfied; and they obviously contemplated subsequent dealings quite independent of and unconnected with the advance of 5000*l.* . . . . With respect to the accommodation bills it is clear that they were nothing more than advances or renewals of advances. With respect to the trade bills discounted after the advances, they were discounted on the terms that Southgate" (i.e., the customer) "should have the proceeds, and not that the proceeds should be applied in liquidation of the 5000*l.*"

In the last case no account current at all was kept between the parties. Lords Halsbury and Herschell seemed to think this fact was by itself sufficient to shew that *Clayton's Case* (1) did not apply, and Lord Macnaghten found in the facts of the case, and the correspondence which took place between the parties, clear evidence that the creditors who received the money payments never intended to give up their right to appropriate them as they pleased; but at the end of the passage cited from Lord Macnaghten's judgment, at p. 294 of the report, there is another passage which runs thus: "Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated

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(1) 1 Mer. 572.

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to the debtor, provided there are no circumstances pointing in the opposite direction."

The only matter of substance relied upon by the respondents as "pointing in the opposite direction" in the present case was, as I understood the argument, this: It is said it never could be supposed that Wilkinson intended to postpone the bank's mortgage to Deeley's, thereby lessening the security of the bank. But the acquisition of priority for the latter security rests on the receipt of the notice by the bank. Wilkinson had forgotten all about the notice. He never thought of the acquisition of priority by Deeley's mortgage, and it seems to me impossible for any human being to intend to bring about, or to retard, a result which was never present in his mind at all. All he knew or remembered was that the mortgage of the bank stood No. 2 upon the list. Moreover, the application of the rule in *Clayton's Case* (1) would, in his state of ignorance of the real facts, have appeared to him quite harmless. There was therefore no reason why he should not intend and desire that that rule should apply.

It has also been urged that it cannot be supposed that the Deeleys could ever have intended to do anything to shake John Glaze's credit with the bank, or cause the bank to think that their security for the latter's overdraft was diminished in value. The answer to that is that Deeley was ignorant of the law touching these matters. He could not have intended to gain priority for his wife's mortgage by any system of appropriating payments, because neither he nor she ever knew priority could be so secured. That in itself, however, does not, I think, prevent them from taking advantage of the benefit which the operation of the law, of which they were ignorant, may have secured to them. There is therefore, in my opinion, nothing to rebut the presumption that the creditors in this case, the branch bank, by keeping Glaze's current account in the way they have kept it, intended to apply the early payments to discharge the earlier debits in the manner indicated in *Clayton's Case* (1), and, accordingly, it must be taken as established that this was done.

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(1) 1 Mer. 572.

It follows that the bank, having had, in fact, notice of Mrs. Deeley's mortgage, cannot, prima facie, as against her, insist that the payments made after the date of that notice, December 2, 1895, should not in the first place be applied, so far as needed, to discharge the debit items anterior to that date: see *Hopkinson* v. *Rolt* (1); *London and County Bank* v. *Ratcliffe* (2); *Union Bank of Scotland* v. *National Bank of Scotland* (3); *Bradford Banking Co.* v. *Briggs.* (4)

The practical result of the application to the facts of this case of the principles established by these two lines of authority must, as Mr. Lawrence has demonstrated on the figures, be taken to be that Mrs. Deeley's mortgage, in fact, gained priority on January 6, 1896. The respondents contend, however, that the conduct of the Deeleys (I make, for the present, no distinction between the husband and wife) was such that it is inequitable on their part to rely upon this priority; that the truth on this matter must be shut out from the consideration of the House. Mr. Astbury, on behalf of the respondents, expressly admits that neither Deeley nor his wife have ever made any representation, false or true, which would make it inequitable in them to rely upon this point. He distinguishes between words and conduct in this respect, and contends that it is by the latter, not the former, they are prevented from insisting on the truth. The burden of proving the affirmative of this proposition rests upon the respondents. They must discharge it by adducing reliable evidence, not by insinuations. What, then, has been the conduct of the Deeleys which it is contended stands in the way of their assertion of the right they have acquired?

First as to the mortgage itself, their story is, in effect, this: that Glaze was largely indebted upon many heads to Deeley, that Deeley was largely indebted to his wife, and that it was arranged between the three that Glaze should execute this mortgage to his sister in discharge in whole, or in part, whichever it be, or to secure in whole or in part, his debt due to her husband.

It does not appear to me that there is anything inherently improbable, or legally or morally wrong, in such a transaction.

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(1) 9 H. L. C. 514.

(2) 6 App. Cas. 722.

(3) 12 App. Cas. 53, at pp. 96—100.

(4) (1886) 12 App. Cas. 29, at p. 36.

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Eve J. deals with the matter at length in the passage in his judgment printed at pp. 109 to 111 of the record. At p. 111 he says: "I have had an opportunity of seeing the witnesses. Without, as I say, accepting the whole of their testimony in detail, I am satisfied in the main of this, that this transaction which took place in 1895 was a transaction which was bona fide to this extent, and perhaps it is sufficient to say to this extent, that Mr. Deeley intended by that, so far as possible, to secure to Mrs. Deeley all the moneys for which he believed he was indebted to her, and I do not believe the bank have discharged the obligation which lies upon them of proving the allegation which they have made, that the whole thing was colourable, and that, in fact, the money was Mr. Deeley's, the mortgage was Mr. Deeley's, and that Mrs. Deeley was merely put forward as a nominee and as a cloak for the transaction which was entered into."

That finding has not, in the argument before your Lordships, been either accepted frankly or challenged boldly. It has been accepted most grudgingly, and with many insinuations. Judging from the evidence, as the Court of Appeal were obliged to judge of it, namely, from the printed report, I find nothing whatever to lead me to reject this finding of Eve J. Mrs. and Mr. Deeley do not appear to me to have been untrustworthy witnesses who endeavoured to conceal anything which they thought might tell against them. On the contrary, they appear to me to have given their evidence, on the whole, with frankness. She stated distinctly that this mortgage was her own, that she kept control of it, only giving it to her husband when he needed to use it in the strange manner I am about to mention. He gave evidence to the same effect. The use of the mortgage to which I refer (Eve J. comments on it at p. 87 of the record) is this: that a very few weeks after its execution Deeley, with the concurrence of his wife, deposited it in the local branch of the bank as a security for a temporary advance to John Glaze, and on four separate occasions repeated the operation. Mr. Wilkinson cannot be the sole official of the bank. None of the other officials were produced to contradict Deeley on this point. It is inconceivable that the nature of the document was not known to some of them. And it certainly appears to me that these transactions not only shew, if indeed that were needed, how slovenly and negligent was the bank's mode of doing their business, and how reckless was their defence, persisted in to the last, that they knew nothing of Deeley's mortgage, but refute completely the charge that he, Deeley, while he was pressing the bank to give the utmost possible accommodation to Glaze, was concealing from them Glaze's true financial position. Deeley was ignorant of the law, but he owed no duty to the bank, who were not his clients, to know it. Even if his conduct amounted to a representation of what the law was, it could not, I think, however erroneous, prejudice the case of himself or his wife, if he honestly said what he thought: see *Eaglesfield* v. *Marquis of Londonderry*. (1) But it is not alleged that anything he said or did amounted to a representation of the state of the law. The conduct which it is contended, as I understand, precludes the Deeleys from relying upon the postponement of the bank's mortgage to their own in this connection is this: They were anxious, it is urged, that Glaze should get all possible accommodation from the bank. They must have known that the accommodation actually to him given would not have been given if the mortgage to the bank had lost its priority. They, accordingly, dealt on behalf of Glaze with the bank on the assumption that the bank's mortgage retained its priority, and having so dealt with them they are estopped from asserting that this mortgage has lost its priority. When that contention is analysed it merely comes to this, that there was a common mistake as to the true state of the facts, due to Wilkinson's ignorance or forgetfulness of fact, and to Deeley's ignorance of a branch of the law which, as regards the bank, he was in no way bound to know. I concur with the Master of the Rolls in thinking that this course of dealing, having taken place as it did, and under the circumstances in which it did, cannot estop the Deeleys from relying on the acquisition of priority by their mortgage.

The only other substantial matter, in my view, pressed against the Deeleys is this: Thomas Glaze, the brother of John Glaze, had given to the bank a bond for 2000*l.* as security for his brother's indebtedness. Mrs. Deeley had given a counter security to Thomas Glaze for the sum of 1000*l*.

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(1) 4 Ch. D. 693.

The sum received by the bank on the sale of the property was sufficient to satisfy mortgages 1 and 2, but left nothing to meet Deeley's mortgage as it originally ranked. If this bond was in fact a security merely collateral to the bank's mortgage, then, of course, when that mortgage was satisfied by the proceeds of the sale, the bond was satisfied, as was also the counter security given by Mrs. Deeley. This bond was not produced, though it was shewn to have been sent to the head office of the bank. It was not cleared up whether on its face it did not shew it was a merely collateral security. Deeley was cross-examined on this point by counsel on behalf of the respondents as to an interview he had with Nicholls in June, 1899. His evidence, which will be found at p. 434, runs as follows:—"(Q.) Just listen again: Did you tell Nicholls that Thomas Glaze's guarantee was only intended to be collateral to the second mortgage? (A.) Yes, I did. (Q.) And that as the bank had got sufficient money by the sale to pay the first and the second mortgage, the guarantee must cease? (A.) I believe I did say so. If he says so I will not deny it." At p. 471, question 2522, he says, "You are asking me about Thomas Glaze. I am referring to an attempt to make Thomas Glaze pay. I went to the bank and shewed my books and correspondence, and I proved to the bank that that 2000*l*. guarantee was collateral to the second mortgage. (Q.) No one suggests that it was not. You do not listen to me. The form of Thomas Glaze's guarantee was this, was it not? That Thomas Glaze guaranteed the indebtedness of his brother John to the bank to the extent of 2000*l*.? (A.) Yes. (Q.) But the fact is that they did not ultimately pursue that remedy which they may have had against Thomas Glaze after having sold this property and paid off? (A.) No, they dropped the contention."

The matter was not cleared up further. Nicholls, Wilkinson's successor, was not asked anything about these negotiations. No evidence was given by him as to whether he had found out whether what Deeley had told him was true or false. It is not suggested that Deeley was guilty of any false representation. If it was true, in fact, that Thomas Glaze's guarantee was only a collateral security, it was his duty to Glaze to say so. The truth is the release of Thomas Glaze from liability has its true foundation in the belief that the bank's mortgage was paid off out of the proceeds of the sale; that was the belief of both Nicholls and Deeley. But Deeley had done nothing to cause Nicholls to form that belief. He had given the notice which, if properly attended to, would have made it impossible for any official of the bank who attended to the rules of the bank to have formed such a belief. There is no evidence that Deeley knew that Wilkinson had forgotten all about this notice, or that Nicholls was not aware of the receipt of it. I do not think, therefore, that the fact that Nicholls and Deeley dealt on the assumption that the mortgage of the bank was thus satisfied can estop Deeley and his wife from insisting now that their own mortgage had acquired priority, or make it inequitable for them to do so.

This being my view, I think it unnecessary to deal with the question of the nature and limits of Deeley's agency for his wife.

I concur with the Master of the Rolls. I think his judgment was right, and I am of opinion that this appeal should be allowed with costs here and below.

Lord Shaw of Dunfermline. My Lords, Mr. John Glaze was the owner of the Brockmoor Steel and Iron Works, in the county of Stafford, and of certain messuages or dwelling-houses there. He carried on a steel and iron business and was in the position of requiring advances of capital. He was a customer of Lloyds Bank Limited, the respondents in this appeal. He executed three mortgages over his property. The first of these need not be referred to. The second was dated September 21, 1893. By it it was stipulated "that the mortgagor hereby covenants with the company that he, the mortgagor, will, on demand, or if no demand is made in his lifetime, then his heirs, executors, or administrators will, on his death, pay to the company the balance then owing from the mortgagor on his account current with the company for cheques, notes, or bills drawn,

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accepted, or endorsed by him, or for advances made to him or for his accommodation or benefit." The indenture contained other clauses usual in similar circumstances, and it was "provided always that the amount to be secured by these presents shall not exceed the sum of 2500*l.*" It is an ordinary bank mortgage to secure to the extent of 2500*l.* a current account.

About two years thereafter, namely, on December 2, 1895, Mr. Glaze granted a further mortgage over the same property in favour of the appellant. Notice thereof was duly given on behalf of the appellant to the bank. The proceedings in this case have been protracted, and much of the delay and elaboration has been due to a denial by the bank that this notice was received. In the witness-box their agent maintained that it had not; and indeed he explained his conduct with regard to his method of keeping the account and of treating subsequent payments by the circumstance that he had not been apprised of the second mortgage. This defence has been held to be unfounded in fact, and it was not maintained at your Lordships' Bar. I incline to the view that the bank agent was of opinion—an opinion entirely justified by the value of the Brockmoor property while there was a going business therein—that the subsequent mortgage was a matter of no moment, looking to the enormous margin of security which still remained for the bank. In these circumstances I think it not unlikely that he took no special account at the time of the notice of the subsequent mortgage, and has forgotten all about it ever since.

Mr. Glaze's circumstances, however, became more and more embarrassed. The bank, after the usual procedure, realized the property by private sale at a price just sufficient to cover the amount of its security together with a prior mortgage which the bank had acquired. In these circumstances the bank maintains that no surplus is available for payment of anything to the appellant. The appellant, however, maintains that payments were made at times and of sufficient amount to extinguish the bank's security, and that consequently her mortgage ranks prior in date to that of the bank, and the debt due thereon should be satisfied accordingly. It is agreed that if this be so

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the bank mortgage would be effective for any balance due from the property after satisfaction of the appellant's mortgage.

The position of the accounts may be stated in a word. The important date is December 2, 1895, being the date of the appellant's mortgage. According to the bank pass-books of Mr. John Glaze, there was at that date a debit balance of 3379*l.* on his current account. This to the extent of 2500*l.* was secured by the bank mortgage. When, however, notice was given of the execution in the appellant's favour by Mr. Glaze of the second mortgage on December 2, 1895, that notice was ignored. Mr. Glaze's account with the bank was continued as before. No fresh account was opened nor fresh security asked. Not even the course, alluded to in argument, of drawing a line across the bank account to distinguish fresh from former payments or advances was taken. Mr. John Glaze continued to pay in money to his credit, and within three weeks, namely, by December 21, 1895, these payments more than extinguished the total amount of the 2500*l.* secured by the bank mortgage. In about another fortnight, namely, by January 7, 1896, further payments were made by Mr. Glaze to the credit of his account which more than extinguished the entire balance due by him secured and unsecured to the bank on December 2 previous.

The case, my Lords, is very similar indeed to that which was expressed many years ago in the compendious phraseology of Lord Chelmsford, which is quoted in the opinion of the Lord Chancellor (Lord Campbell) in *Hopkinson* v. *Rolt* (1): "'A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?'"

My Lords, there are dicta of the learned judges in this case, and in particular of Fletcher Moulton L.J., to which I shall afterwards refer, which make it appear almost necessary to recapitulate the general rules applicable to this subject. These general rules do

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(1) 9 H. L. C. at p. 523.

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not appear to have been left unsettled, but, in the view which I take of the judgment of Fletcher Moulton L.J., and with the high respect which I have for that learned judge, it humbly appears to me that these rules would be subjected to considerable change if his judgment were affirmed by your Lordships' House.

Upon the topic of the rights arising between a bank which has obtained a first mortgage over the property of a customer, and a second mortgagee who has obtained a second mortgage over the same property and has given notice thereof to the bank as first mortgagee, it may be necessary to state the law of the transaction from its commencement. I think that the rules simply stated are these:—

1. In the case of a grant of a mortgage to a bank by a customer in security of advances made and to be made, there, of course, still remains in the customer an estate capable of being disposed of by sale or affected by subsequent mortgage, and if a second mortgage is granted and notice given to the first mortgagee, it is contrary to good faith upon the part of the bank as first mortgagee to make in its own favour encroachments upon that remanent estate which would in effect enlarge the scope of the first mortgage and make it stand as cover for fresh advances. I have been anxious to place this proposition in the forefront of the case because it appears to me to be well founded in principle, to be amply warranted by authority, and to dispose of not a few of the arguments in reference to the equities as between the bank and its customers which have been freely used in this case. On the matter of authority I am humbly of opinion that the judgment of Lord Lindley (then Master of the Rolls) in *West* v. *Williams* (1) is of the highest value. That learned Lord says (2), summing up what in his opinion was the effect of *Hopkinson* v. *Rolt* (3), *Bradford Banking Co.* v. *Briggs* (4), and *Union Bank of Scotland* v. *National Bank of Scotland* (5): "These three cases shew very clearly that the principle which underlies the rule established in *Hopkinson* v. *Rolt* (3) is simply this, that an owner of property, dealing honestly with it, cannot

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(1) [1899] 1 Ch. 132.
(2) [1899] 1 Ch. at p. 143.
(3) 9 H. L. C. 514.
(4) 12 App. Cas. 29.
(5) 12 App. Cas. 53.

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confer on another a greater interest in that property than he himself has. The rule rests on no technicality of English law; it is based on the plainest good sense, and it is as much the law of Scotland as the law of England. When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first. Nor can any one who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has."

2. It is also contrary to good faith upon the part of the mortgagor himself, who has granted two successive mortgages, to do anything which would facilitate the enlargement of the scope of the first mortgage to the detriment of the second, or would minimize the value of that remanent estate which as mortgagor he had assigned by the second mortgage subject to the first. This rule stands in the same position as the former in principle. It is covered also by the authority of Lord Lindley, just referred to, and in the *Union Bank Case* (1) Lord Halsbury made it particularly clear. "The question is," said his Lordship, "whether Mrs. McArthur" (the mortgagor) "having bargained away and made an assignation of her reversionary right to the knowledge of the National Bank could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. My Lords, it seems to me that such a proceeding is contrary to good faith, and the decision of your Lordships' House in *Hopkinson* v. *Rolt* (2) establishes the principle, and establishes it upon the broadest grounds of natural justice."

Language to the same effect, and put in principle upon the same basis, is used by Chitty L.J. in *West* v. *Williams*. (3)

3. This being the basis upon which the doctrine under discussion rests, the third general rule springs therefrom, and is applicable in the case of a bank holding a first mortgage in security of advances made and to be made on current account as

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(1) 12 App. Cas. 53, at p. 95.

(2) 9 H. L. C. 514.

(3) [1899] 1 Ch. at p. 146.

follows: After notice to the bank of a second mortgage by the customer, the debit is struck at the date of notice, and in the ordinary case, that is to say, where an account is merely continued without alteration, or where no specific appropriation of fresh payments is made, such payments are credited to the earliest items on the debit side of the account, and continue so to be credited until the balance secured under the first mortgage is extinguished.

My Lords, the judgment of Eve J. in this case, although in my view it is erroneous in holding that the general rule was by the conduct of the parties departed from, humbly appears to me to state that general rule, and also the effect of the series of authorities under which it has been canvassed, clearly and luminously, and I respectfully adopt that part of the learned judge's judgment. After referring to *Sherry's Case* (1), he says: "In giving judgment the Lord Chancellor (Lord Selborne) says this: 'The principle of *Clayton's Case* (2) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he prima facie appropriates them to the account, and the effect of that is, that the payments are de facto appropriated according to the priority in order of the entries on the one side and on the other of that account.' I understand that to mean this: According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made; and having been made, it is made once for all, and it does not lie in the mouth of the creditor

(1) 25 Ch. D. 692, at p. 702.

(2) 1 Mer. 572.

afterwards to seek to vary that appropriation." This is substantially the view taken by the learned Master of the Rolls in his clear opinion in this case, and I respectfully agree with that opinion.

There are two passages, however, my Lords, in the judgment of Fletcher Moulton L.J. which appear to me to deserve grave consideration. In that learned judge's view, the law applicable to the ordinary case of a mortgage to a banker to secure a current account is this: "When the bank receives notice of a second mortgage by the customer to a third person it does not in my opinion affect the nature of the security. It remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced, and once reduced cannot again be raised." In a subsequent passage the same learned judge says: "In the simple case, therefore, of a secured account with subsequent payments in and payments out I am of opinion that the presumed intention should be to apply the payments in to the unsecured items in order of date in priority to the secured items."

My Lords, I am humbly of opinion that these passages, which express a principle for and perhaps against which much could be said upon general grounds, are not and have not for many years been any part of the law of England or of Scotland. They appear to me to be in direct contradiction to authority, from *Clayton's Case* (1) downwards to the judgments of Eve J. and the Master of the Rolls in the present case. Lord Blackburn, commenting upon the series of decisions, and in particular on *Hopkinson* v. *Rolt* (2), puts the matter thus (3): "A mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to postpone advances made by the second mortgagee with notice to the first to advances made by the first mortgagee after notice of the second mortgage." In short, I do not see my

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(1) 1 Mer. 572.

(2) 9 H. L. C. 514.

(3) 6 App. Cas. at p. 738.

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way to hold that the passages to which I have referred can stand alongside of the high authorities in the other direction.

4. Of course, upon the extinction of the first mortgage by the credit payments, the latter mortgage, its predecessor being thus satisfied, attains priority, and, subject to the priority of the second mortgage, the mortgagor still remains answerable as debtor, and his property, or any remanent value thereof covered by the mortgage, remains the security to the bank.

My Lords, once these rules have been established, it seems late in the day to put forward considerations, such as appear in this case, as to either their inherent impropriety or their harshness in operation as against bankers. For, in the first place, the rules are, it may be affirmed, universally known and accepted in the banking world; and, secondly, the mode of protection open to bankers is as familiar and as simple as could be imagined. This case itself is an excellent illustration of the familiarity of the subject, and of the mode in which a bank quite easily and naturally secures its own protection. The respondents in this appeal had a printed rule upon the subject. That rule was in the following terms:—"Wherever notice is received of a second mortgage or second charge on any security on which the bank holds a proper charge, the account must at once be ruled off and a separate account opened for subsequent transactions."

Accordingly, in the present case, when the notice of the second mortgage, which it is now admitted was duly received, was given, the bank's procedure was laid down by the rules which it itself had set up. As I have already indicated, my view is that its agent, who swore in the witness-box that the notice had not been given, and who I think had not remembered the circumstance, treated the whole matter as of little consequence on account of what he considered the ample margin of security. As it was, what occurred was that the account was continued in the ordinary way, no change whatever being made in the direction either of stopping the existing account or of appropriating fresh payments, until after the time when, on the principle of *Clayton's Case* (1), the debt due to the bank had been extinguished. In the language of Lord Blackburn in *Ratcliffe's Case* (2), "The bank might, if they pleased, have taken the payments on such terms as to prevent the application of that rule" (*Clayton's Case* (1)), "but, not having done so, it seems to me that the old balance was, before the end of the year, 1873, paid off."

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(1) 1 Mer. 572.

(2) 6 App. Cas. 722, at p. 737.

The whole question of possible hardship upon bankers was discussed fully by Lord Chancellor Campbell fifty years ago in *Hopkinson* v. *Rolt* (2): "The hardship upon bankers," said the Lord Chancellor, "from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange), what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss." And in another passage he says (3): "How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security."

In the present case what the bankers did was to ignore the notice of the second mortgage and to ignore their own rule, and, in fact, to make no specific appropriation whatever; and their dealings with the account were exactly the same as if there never had been a second mortgage or the rights of a second mortgagee. Speaking for myself, I cannot, in such circumstances, understand how the conduct spoken to in evidence can be held to amount to a recognition of a second mortgage, which throughout was maintained not to have been known. Nor does it seem possible to me that such conduct instituted or implied transactions so arranged as to avoid the incidence of the *Clayton* principle, the bank's own rule for the latter being plain and having been ignored.

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(1) 1 Mer. 572.
(2) 9 H. L. C. at p. 535.
(3) 9 H. L. C. at p. 534.

I am humbly of opinion that the judgment of the Courts below should be reversed.

LORD MACNAGHTEN. My Lords, I agree with the judgment of the Master of the Rolls and with the judgments which have just been delivered by my noble and learned friends.

Order of the Court of Appeal reversed: Declared, that all payments into the current account of John Glaze with the bank made after December 2, 1895, *ought to be treated as appropriated against the indebtedness on the same current account of John Glaze as on December* 2, 1895: *That on the basis of such appropriation the money secured by the bank mortgage had as against the appellant and the appellant's mortgage been discharged and satisfied on or before January* 8, 1896: *And ordered, that the accounts directed by the order of Eve J., dated April* 3, 1909, *be taken on the footing of the foregoing declarations and of there being nothing due as on June* 6, 1899, *to the bank under the bank mortgage, and that all consequent alterations may be made in the said order of April* 3, 1909: *And further ordered, that the respondents do pay the costs of the appeal to this House, and the costs of the appeal to the Court of Appeal, and also the costs of the action (except so far as such last-mentioned costs were increased by certain claims as to which there was no appeal): Further ordered, that the cause be remitted to the Chancery Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, July 26, 1912.

Solicitors for appellant: *Field, Emery, Roscoe & Medley, for Frank Deeley, Dudley.*

Solicitor for respondents: *Pretor W. Chandler, for Hooper & Fairbairn, Dudley.*

[HOUSE OF LORDS.]

H. L. (E.)*
1911
Dec. 15;
1912
July 26.

THE ATTORNEY-GENERAL (AT THE RELATION OF THE CORPORATION OF TAMWORTH AND THE TAMWORTH RURAL DISTRICT COUNCIL) . . . . APPELLANT;

AND

BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD . . . . RESPONDENTS.

Stream—Pollution—Injunction—Court of Appeal—Jurisdiction—Discharge of Injunction on Subsequent Facts—Reference to Expert—Procedure—Breach of Statutory Duty by Public Body—Remedy—Right of Attorney-General to Injunction—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 17—*Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *ss.* 13, 15, 17—*Rules of the Supreme Court, Order* XXXVI., *rr.* 49, 55C; *Order* LVIII., *rr.* 1, 4.

An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard.

The Court of Appeal may, without the consent of the parties, refer any question arising on the appeal to an expert to inquire and report; and, although the prescribed mode of conducting such inquiry is by taking evidence, the parties may waive that procedure and may consent to the inquiry being conducted by means of experiments.

Per Lord Robson: In an action by the Attorney-General complaining of a breach of a public statute by a public body the Court is not bound, on proof of the breach, to grant an injunction, but may allow the defendants a reasonable time within which to comply with the statute.

Kekewich J. having granted at the instance of the Attorney-General a perpetual injunction restraining a public drainage board from discharging sewage water into a river in contravention of s. 17 of the Public Health Act, 1875, the defendants appealed. Upon the appeal the defendants did not contest that the injunction was properly granted on the facts existing at the trial, but they obtained successive adjournments of the appeal to enable them to complete certain sewage works upon which they were engaged in order to comply with the section. On the completion of the works, there being a conflict of evidence as to their sufficiency, the Court referred the matter to an expert to report, and he reported that the sewage effluents from the defendants' works which entered the river after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious and other foul or noxious matters that they did not affect or deteriorate the purity of the water in the river. The Court then, being of opinion that there was no longer any breach of the section, discharged the injunction upon the defendants undertaking to use their best endeavours to prevent any future breach; the defendants to pay the costs of the appeal:—

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* *Present:* EARL LOREBURN L.C., LORD ATKINSON, LORD GORELL, and LORD ROBSON.

Held that, although the Court had jurisdiction to discharge the injunction, it ought not in the exercise of its jurisdiction to have accepted, in lieu of the injunction, an undertaking in the limited form above stated, and the House substituted for this undertaking an undertaking by the defendants that the existing results, as described in the report of the expert, should in future be maintained; the defendants to pay three fourths of the costs of the appeal to the House.

Order of the Court of Appeal [1910] 1 Ch. 48, varied.

APPEAL from two orders of the Court of Appeal dated respectively June 22, 1909, and November 19, 1909, the first referring certain questions to an expert for inquiry and report, the second discharging an injunction granted by Kekewich J. and substituting for it an undertaking. (1)

The facts are fully stated in the judgment of Lord Gorell, but the following short summary of the facts may be useful to explain the nature of the arguments.

In 1899 an action was brought under s. 17 of the Public Health Act, 1875, by the appellant, the Attorney-General, at the relation of the Corporation of Tamworth and the Tamworth Rural District Council, against the respondents, the Birmingham, Tame, and Rea District Drainage Board (hereinafter called the defendants), for an injunction to restrain the defendants from conveying sewage or filthy water into the river Tame until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in the river.

The defendants were a joint board established under s. 279 of the Public Health Act, 1875, for the purpose of treating the sewage of the city of Birmingham and various other sanitary districts.

At the trial of the action in 1907 Kekewich J. granted a perpetual injunction.

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(1) [1910] 1 Ch. 48.

The defendants appealed.

Upon the appeal the defendants admitted that the injunction was properly granted on the facts before the learned judge, subject to a question as to the disposal of the storm-water flow in the case of exceptional rains, but the appeal was adjourned from time to time to enable the defendants to complete some very extensive sewage works upon which they were engaged with a view to complying with the requirements of the statute. These sewage works involved a complete alteration of the system of treatment previously adopted by the defendants. After the completion of these works at an enormous cost the appeal again came before the Court. Affidavits were filed by experts on both sides with reference to the question of the sufficiency of the works and there was a conflict of evidence upon this point. The defendants contended that in view of the altered state of facts arising from the completion of the works the injunction ought to be dissolved; the relators on the other hand asserted that the works were not sufficient to treat either the normal or dry weather flow or the storm-water flow, and that they ought not to be deprived of the benefit of the injunction, which was rightly granted and had not been called in question except as to the storm-water flow.

In this state of things the Court of Appeal, by an order dated June 22, 1909, ordered that it be referred to Sir William Ramsay, K.C.B., F.R.S., to inquire and report to the Court whether the sewage effluents from the defendants' works which entered the river Tame were before entering the said river entirely or to any and what extent freed from all excrementitious matter or other foul or noxious matters such as would affect the purity of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom; and the order contained a provision, inserted at the instance of the relators (who desired that the matter should be referred not to a chemist but to an engineer), that Sir William Ramsay on his first visit should be attended by the engineers on either side. Sir William Ramsay stated in his report that he had visited the sewage works on three occasions, and that on the first occasion the engineers of the respective parties were present and accompanied him over the whole of the sewage works, and he reported that, in his opinion, the river was not made fouler by the entry of the Birmingham effluents, and that the sewage effluents in question were to such an extent freed from excrementitious matter and other foul and noxious matters that they did not affect the purity of the water in the river at the places mentioned.

On November 19, 1909, the appeal again came on for hearing upon the consideration of this report. The relators, conceiving that the report was erroneous in certain particulars, tendered an affidavit of an analytical chemist shewing what he conceived to be the errors in the report, but the Court refused to admit the affidavit and made an order whereby, after stating that it appeared that the state of things existing at the date of the judgment had since been changed by means of the permanent works constructed by the defendants so that there was no longer any breach of the statutory provisions contained in s. 17 of the Public Health Act, 1875, and the defendants by their counsel undertaking to use their best endeavours to prevent in future any breach of such statutory provisions, it was ordered that the injunction be discharged, the defendants to pay to the relators the costs of the appeal.

1911. June 26, 27; July 3. *Astbury, K.C.*, and *Macmorran, K.C.* (*John Henderson* with them), for the appellant. The defendants conceded that the injunction was rightly granted and the appeal was adjourned from time to time upon the terms that the injunction should not be disturbed except as to storm-water. In the circumstances the defendants' proper course was to apply to the Court of first instance for a suspension of the injunction and if a suspension was refused to appeal against that refusal. The defendants' appeal was wholly unfounded and they admitted that they were in mercy. Unless the order appealed from was wrong the Court of Appeal had no jurisdiction to discharge it, nor had it any jurisdiction to refer the matter to an expert except by consent (and there was here no consent) or to determine the appeal against the relators upon the sole statement of the expert. The relators tendered evidence as they were entitled to do impeaching the accuracy of the expert's report, but the Court refused to admit it.

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Sir R. Finlay, K.C., and *P. O. Lawrence, K.C.* (*T. T. Methold* with them), for the respondents. An appeal is a rehearing, and the Court of Appeal may make such order as the Court of first instance could have made if the case had been tried at the date when the appeal was heard, and may hear evidence as to any fact occurring since the trial: Judicature Act, 1873, s. 19; Rules of the Supreme Court, Order LVIII., rr. 1 and 4. Therefore, in determining whether this injunction ought to be continued, the Court of Appeal had jurisdiction to deal not only with the state of facts in existence at the time of the trial, but also with the state of facts which had come into being since, and in the interval between the judgment of Kekewich J. and the order of the Court of Appeal the supersession of the old system of drainage had been completed. With regard to the power of the Court to refer the matter to an expert, s. 56 of the Judicature Act, 1873, empowers the High Court or the Court of Appeal to call in the aid of specially qualified assessors, and s. 13 of the Arbitration Act, 1889, empowers the Court to refer questions for inquiry and report to a special referee and provides that his report may be adopted wholly or partially by the Court. Sect. 15, sub-s. 1, provides that the reference shall be conducted in such manner as may be prescribed by rules of Court, and s. 17 provides that the Court of Appeal shall have all the powers conferred by the Act on the Court under the provisions relating to references under order of the Court. These provisions of the Arbitration Act replaced certain provisions of the Judicature Act, 1873, which were repealed at the same time. The rules now in force with regard to the conduct of such references are rr. 48, 49, 54 and 55 of Order XXXVI., and r. 49 contemplates that witnesses shall be called on the reference. But notwithstanding that rule there is power, if the parties so desire, to proceed, not by witnesses, but by inspection. *Badische Anilin und Soda Fabrik* v. *Levinstein* (1) is exactly in point. That case, following *Mellin* v. *Monico* (2), shews that the Court has power to refer questions to a special referee for inquiry and report without the consent of the parties. Then with regard to the mode of procedure, the relators have waived any irregularity by obtaining a provision in the order of reference that their engineer should be present at the first visit of the referee to the works and by the attendance of their engineer on that occasion. In a matter of chemistry like this it is infinitely more convenient that the report of the expert should be given from experiments rather than after hearing evidence, and in this case the report was not challenged on the ground of procedure. As to the power to discharge the injunction, it is clearly open to the Court of Appeal to suspend the injunction to any extent, and if the state of circumstances has wholly altered it must have power to dissolve. It is a very serious thing if a statutory body such as this, after spending enormous sums of money in perfecting their system of drainage, should be compelled to work perpetually under an injunction. The function of an injunction is to stop acts which have been done and the recurrence of which is to be apprehended. Here the injunction has done its work and there is no ground for continuing it. It is objected that the Court refused to hear an affidavit impeaching the accuracy of the report, but if there was to be a further conflict of evidence on this point the whole utility of the procedure of reference would be gone. No doubt the relators might have moved to vary the report, but no such motion was made. It may be said that the undertaking is not so wide as the injunction, as it is merely that the defendants should do their best, but that is because the cause of complaint has been removed, and it does not prejudice the right of the relators to take fresh proceedings.

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(1) (1883) 24 Ch. D. 156, at pp. 166, 167; (1885) 29 Ch. D. 366, at p. 389; (1887) 12 App. Cas. 710, at p. 713.

(2) (1877) 3 C. P. D. 142, at p. 149.

Astbury, K.C., in reply. The Court has power under the rules to call in the aid of assessors, and it has also power under s. 13 of the Arbitration Act to refer questions to a special or official referee. But in the latter case the inquiry is a judicial inquiry to be heard and determined according to the ordinary rules of evidence. It is said that the relators consented to the waiver of the ordinary rules of evidence, but they neither did nor could do so. In *Mellin* v. *Monico* (1) Brett L.J. says that s. 56 of the Judicature

(1) 3 C. P. D. 142.

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Act, 1873, which so far as it related to special and official referees was replaced by s. 13 of the Arbitration Act, 1889, provided a new tribunal, which implies that the inquiry must be a judicial inquiry. In *Badische Anilin und Soda Fabrik* v. *Levinstein* (1) it does not appear whether the reference was to an assessor or to a special referee, but the reference was stated to have been by consent of the parties (see p. 158). Even if there was no active consent the parties raised no objection to the course proposed by the Court. Here there was no consent to the reference itself; the only consent, if any, was as to the terms of the reference. Then as to the discharge of the injunction, in an ordinary case, if the order appealed from is right, the Court of Appeal has no jurisdiction to reverse it. It was admitted that this injunction was rightly granted and that the appeal was for the purpose of gaining time. The Court of Appeal could only have heard additional evidence to shew that the judgment itself was wrong. Here the Court of Appeal has decided a perfectly new issue tried on affidavits upon which there was no cross-examination. In the circumstances of this case the proper course for the Court of Appeal to have taken was to suggest that the parties should go back to the Court of first instance. Further, where, as in this case, a breach of a public statute is proved, the Court has no discretion to refuse to grant an injunction at the suit of the Attorney-General: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2); *Attorney-General* v. *Cockermouth Local Board* (3); *Attorney-General* v. *Great Eastern Ry. Co.* (4); *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (5); *Attorney-General* v. *London and North Western Ry. Co.* (6) Kekewich J. was therefore bound to grant the injunction. That is an additional reason why this injunction should not be discharged. Even if the Court of Appeal had jurisdiction to dissolve this injunction the jurisdiction was wrongly exercised. The undertaking is illusory, and the action is at an end. The effect of that is to deprive the relators of their right to proceed by sequestration and to put upon them the heavy burden of commencing fresh proceedings in the event of any further pollution of the river.

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(1) 24 Ch. D. 156.

(2) (1868) L. R. 4 Ch. 146, at p. 157.

(3) (1874) L. R. 18 Eq. 172.

(4) (1879) 11 Ch. D. 449, at p. 483; affirmed (1880) 5 App. Cas. 473.

(5) (1882) 21 Ch. D. 752.

(6) [1900] 1 Q. B. 78.

The House took time for consideration.

1911. Dec. 15. EARL LOREBURN L.C. My Lords, I have had the opportunity of considering in print the opinion given by my noble and learned friend Lord Gorell, and I am quite prepared to agree with the form of order proposed by his Lordship. My own view is that what happened when the Birmingham Drainage Board obtained time precluded them from asking that the injunction granted by Kekewich J. should be dissolved. And I am not at all satisfied that such a question as that referred to Sir William Ramsay ought to have been referred, especially as the present appellants objected to that way of dealing with the case. If a trial as to the condition of the river was proper before these improvements were made, I cannot see why one of the parties should be practically compelled to leave it in the hands of an eminent scientist to determine the condition of the river after the improvements were made. But upon these points I defer to the opinion of the Court of Appeal, supported as it is by the concurrence of your Lordships.

I am content to concur with your Lordships in the order proposed. It will settle the point at the moment in debate, namely, the sufficiency of the condition of the river at the date of Sir William Ramsay's report, and will impose upon the Birmingham Drainage Board the duty of keeping it in the condition required by the statute. It will also leave to the relators the right to apply to the Court if this duty is not discharged, without the need of a new action.

I could not have agreed to substitute, as the order of the Court of Appeal does substitute, for an injunction to obey a statute an undertaking by the respondents merely to do their best to obey. A Court of law has no power to grant a dispensation from obedience to an Act of Parliament.

If the respondents are not prepared to give the undertaking required, then I consider that the appeal should be allowed and the injunction continued. Time will be given to consider the form of order and the course which the parties may take.

Lord Atkinson. My Lords, I, too, have had the advantage of reading the judgment of my noble and learned friend Lord Gorell. I concur in it and approve of the form of order which he suggests should be made, as well as the course to be adopted in case what he suggests should not be accepted by the parties.

Lord Gorell. My Lords, this appeal is from two orders of the Court of Appeal, dated June 22, 1909, and November 19, 1909, respectively. The first was an order that it should be referred to Sir William Ramsay to inquire and report as to the condition of the sewage effluents from the respondents' works which enter the river Tame; and the second discharged a perpetual injunction granted by the late Mr. Justice Kekewich restraining the respondents from conveying sewage or filthy water into the river Tame until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water of the said river.

The respondents are a statutory board for the purpose of treating the sewage of various boroughs, urban and rural sanitary districts, including Birmingham. Their district comprises a drainage area of nearly 100 square miles, and contains a population of about 950,000 persons, and they have established and laid out, at Saltley and in the Tame Valley, sewage disposal works and irrigation lands, and for these purposes utilized a large acreage of land.

Their sewage farm extends for more than six miles along the river Tame, and they own the land on each side of the river for a considerable distance. The borough of Tamworth is about twelve miles down the river from the land of the respondents, and the land under the jurisdiction of the said borough or of the Tamworth Rural District Council does not come higher up the river than a point between five and six miles below the eastern boundary of the said sewage farm.

My Lords, as I understand the facts, the river Tame, before it reaches the boundary of the respondents' sewage farm, flows through populous manufacturing districts, and is polluted with sewage and manufacturing refuse, and, shortly after it reaches the respondents' sewage works, it is joined by the river Rea, a river which flows through the city of Birmingham, and, for a considerable distance immediately before joining the Tame, through populous manufacturing districts, and is also polluted before it gets to the respondents' works.

It does not seem to have been alleged by the appellants that the respondents have created a nuisance either by their works or by the discharge of the effluent from those works into the river Tame, though they, in fact, discharged the effluent from their works into the Tame.

The action was brought on June 13, 1899, in order to obtain an injunction to restrain the respondents from making or using any sewer, drain, or outfall in or about their sewage farm for the purpose of conveying, and from conveying, sewage or filthy water into the river Tame, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in the said river. It was alleged that the respondents were acting in breach of s. 17 of the Public Health Act, 1875, which is as follows: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

In July, 1899, the appellants moved for an interlocutory injunction in the terms claimed by the statement of claim, but the Court declined to grant an injunction upon the respondents' undertaking until the trial or further order to exercise their statutory powers with regard to their said sewage farm under the supervision of an engineer agreed upon by the parties.

The engineer made a report (see record, p. 24), and by an order dated November 24, 1899, made upon another motion by the appellants, the respondents undertook that they would carry out the recommendations contained in the said report under his direction with all reasonable despatch, and thereupon the Court ordered that the trial of the said action should stand over until the Easter Sittings, 1900.

In May, 1900, the appellants again moved for an injunction, and by an order of that date, the respondents admitting that at the date of the issue of the writ the appellants had a good cause of action for the relief claimed, and again undertaking to carry out the recommendations contained in the said report under this engineer's direction and with all reasonable despatch, it was ordered that the trial of the action stand over until after the second motion day in Michaelmas Sittings, 1900.

The respondents appear to have proceeded to construct and carry out the works recommended in the said report, and expended large sums in so doing, but finding that the works were not sufficiently effective, they decided on advice to treat the sewage in septic tanks and then to pass the effluent through bacteria percolation beds, and they commenced the construction of such septic tanks and bacteria beds. It seems that the alterations and other works necessary to adapt the respondents' works so as to enable the sewage to be treated according to the new system involved practically the entire remodelling of the works, and necessarily a long time elapsed while their fresh works were being proceeded with.

The appellants brought the action to trial on November 21, 1907, and the injunction was granted by Kekewich J.

He decided against a contention of the appellants that under s. 17 of the Public Health Act, 1875, it was incumbent upon the respondents to purify their effluent absolutely to the standard of a naturally pure stream, and that it was immaterial that the river Tame was already highly polluted, holding that the Legislature intended only to prohibit the deterioration, that is, the making worse the purity and quality of the stream or watercourse, and that no one could be said to have offended against the prohibition if, as a matter of fact, there had been no such deterioration. He further decided that he was bound by law to grant an injunction. The grounds upon which he so acted are stated by him in his judgment at p. 37 of the record. He had already stated that the respondents had done their best to discharge the duty imposed upon them, and to this end had employed not only money without stint, but, to the best of their ability and so far as circumstances had permitted, all the means which the resources of modern science had placed at their disposal (see record, p. 34), but although he stated that they had met with a large measure of success, that there is no reason to believe that they will not persistently struggle, and that there is every reason to believe that success in the future will be greater than in the past, he declined to act on an appeal by the respondents for further reasonable time to do what remained to be done to prevent the commission of an offence, and granted an injunction. He seems to have thought that, as there was a breach of duty at the time, the injunction was a matter of right to the Attorney-General, and that the case was not one for a declaration of right only, or for the suspension of an injunction. He further did not think that the remedies which the respondents proposed to adopt were sufficiently certain or could be perfected within a sufficiently definite time to make that procedure applicable, but he added that the Court would be extremely reluctant to allow process to issue unless and until the respondents had had a reasonable time for remedying the present state of affairs, and had neglected to use the opportunity thus afforded to the best advantage.

At the time when the said judgment was given, the respondents had already made progress towards carrying out their proposed new works, and on March 14, 1908, they appealed against the judgment of Kekewich J. The Court of Appeal in July, 1908, when the appeal first came on, directed that the matter should stand over in order that the works might be prosecuted and affidavits brought before the Court shewing what the respondents had been doing to purify the effluent from their works since the trial of the action, and the appeal accordingly stood over for nearly a year and the works were proceeded with.

At the hearing of the appeal on June 11, 1909, affidavits were put in shewing what the respondents had done, and that they had adopted the most scientific method; but the appellants in affidavits filed by them disputed the result of what had been accomplished by these methods, and the Court decided to refer the questions set out in the order it made for inquiry and report to Sir William Ramsay, and made the first of the orders appealed against in the following terms:—"This Court doth order, that it be referred to Sir William Ramsay, K.C.B., F.R.S., to inquire and report to the Court whether the sewage effluents from the defendants' works, which enter the river Tame, are, before entering the said river, entirely, or to any and what extent, freed from all excrementitious matter or other foul or noxious matters, such as will affect or deteriorate the purity of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom. And it is ordered, that the said Sir William Ramsay on his first visit be attended by the engineers on either side. And it is ordered, that this appeal do stand over to the Michaelmas Sittings, 1909."

Sir William Ramsay accordingly held his inquiry and made his report, dated October 20, 1909, which he concludes as follows: "To sum up, my opinion is that the river is not made fouler by the entry of the Birmingham effluent. To adopt the terms of reference, the sewage effluents from the defendants' works which enter the river Tame are to such an extent freed from excrementitious matter and other foul or noxious matters that they do not affect or deteriorate the purity of the water in such river (1.) at the points of entry or (2.) within a distance of 600 yards therefrom."

In November, 1909, the appeal again came before the Court of Appeal, and the Court, after hearing the parties and reading the report of Sir William Ramsay, made the second of the orders appealed against, by which, after reciting as follows, "And it appearing that the state of things existing at the date of the said judgment has since been changed by means of the permanent works constructed by the defendants, so that there is no longer any breach of the statutory provisions contained in section 17 of the Public Health Act, 1875, and the defendants by their counsel undertaking to use their best endeavours to prevent in future any breach of such statutory provisions," the Court ordered that the said judgment of November 21, 1907, so far as the same granted an injunction, be discharged, and that the defendants pay to the relators their costs occasioned by the appeal.

This appeal was then brought to your Lordships' House.

The first point made by the appellants was that the Court of Appeal had no jurisdiction to dissolve the injunction. It is not necessary to consider what would have been the position if, the injunction having been granted, an application was made to the Court of Appeal to dissolve it; for the order of Kekewich J. having been made in November, 1907, the application to the Court of Appeal in March, 1908, was by way of appeal from his order, and sought to have it reversed and the action dismissed (see record, p. 43).

The appellants asserted, however, that on the appeal the Court of Appeal could not interfere with the order if it were rightly made at the time. The respondents admitted that the order was rightly made at the time it was made, though there was a question as to what was to be done with regard to storm-water; but their point was that since the order they had completed the construction of fresh works, and that there was no longer any breach by them of the provisions of the Act aforesaid, and no necessity or reason for the injunction continuing. They maintained that the hearing before the Court of Appeal was a rehearing, upon which fresh evidence could be given, and that the Court should determine the matter as at the time of the rehearing.

Under the Judicature Acts and Rules the hearing of an appeal from the judgment of a judge is by way of rehearing, and the Court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the Court may think fit (see Order LVIII., rr. 1 and 4).

The Court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see Order LVIII., r. 4).

It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing, and if any authority were required for this proposition it is to be found in the case of *Quilter* v. *Mapleson*. (1) In that case an action of ejectment had been brought under a proviso of re-entry for breach of a covenant in a lease, and Lord Coleridge C.J. gave judgment for the plaintiff. The defendant appealed and obtained a stay, so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the Conveyancing and Law of Property Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal, consisting of Jessel M.R. and Lindley and Bowen L.JJ., reversed the decision, and granted the relief sought for by the defendant, holding that on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance.

In my opinion the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard.

Then it was urged by the appellants that the Court of Appeal had no power to take the course it took, of ordering a reference to Sir William Ramsay, and ought not on the materials before it to have reversed the decision of the learned judge.

The question before the Court of Appeal was this. The respondents did not dispute that the decision was right at the time it was given, subject to the minor question aforesaid, but they said, in substance, the disposition of this sewage is a matter which required the expenditure of vast sums of money, and the application of highly scientific means for properly dealing with it; we have expended immense sums and adopted the most advanced scientific processes, so much so that our works have become renowned; we have been engaged for a considerable time upon this work, and although at the time of the hearing before the learned judge we had not produced completely successful results, we have now done so, and there is no need for an injunction. The appellants disputed this, and maintained that there was still a breach of the statute. The dispute was dealt with in the conflicting affidavits in the Court of Appeal, but no viva voce evidence appears to have been tendered. In these circumstances the Court of Appeal appears to have made use of the powers conferred by s. 13, sub-s. 1, and s. 17 of the Arbitration Act, 1889, which are as follows:—Sect. 13, sub-s. 1: "Subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry and report to an official or special referee." Sect. 17: "Her Majesty's Court of Appeal shall have all the powers conferred by this Act on a Court or judge thereof under the provisions relating to references by order of the Court."

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(1) (1882) 9 Q. B. D. 672.

It is contended by the appellants that the Court has no power to make the order referring the questions above set out to Sir William Ramsay, except by consent, and that no consent was given by them. I do not think that this contention can be supported. In my opinion the Court had power to make the order without consent. On reading through the discussion before the Court of Appeal, it does not appear that consent to the order can be inferred against the appellants, but to my mind the real objection of the appellants was not that the Court had no power to make an order if it had jurisdiction to entertain the question of the setting aside of the injunction, but that the injunction being right at the time it could not, and ought not, to interfere. The order was made, and the discussion shewed that, so far as the terms in which it was couched are concerned, no objection to it was raised by the appellants (see record, p. 188).

But the next point was that a reference for inquiry and report under the section is to be as prescribed by rules of Court and subject thereto as the Court or judge may direct (s. 15), and that the reference in question should have been held in the ordinary way, with evidence and the hearing of the parties. It is clear that Order XXXVI., r. 55C, makes the provisions of rr. 48 to 55 of that Order and of r. 55B apply to such a reference, but parties may waive the formalities of procedure which would render the carrying out of a reference of this kind inconvenient and impracticable, and accordingly we find that the parties do not appear to have required a formal hearing, and although the appellants had obtained the insertion in the order of the provision that an engineer on each side should accompany Sir

William Ramsay on his first visit, they left him to make his inquiry and report in the practical way which was obviously contemplated. I find from his report that the engineers on both sides were present during his first visit, and accompanied him over the whole of the sewage works, that the documents mentioned by him were placed at his disposal, and that analyses, reports, and surveys, &c., were supplied to him.

The result was his report already mentioned.

According to s. 13, sub-s. 2, of the Arbitration Act, 1889, the Court may, but is not bound to, adopt wholly or partially a report by an official or special referee. In this case the Court adopted the report of Sir William Ramsay, and no application was made to it to hear further viva voce evidence. It is said that an affidavit criticizing the report was tendered by the appellants, but, as I understand, it was only referred to in the address of counsel for the respondents, when the Court intimated that it did not wish to hear it. It does not appear to have been mentioned again, and neither it nor any other evidence appears to have been formally tendered. I feel sure that the Court of Appeal must have considered that to commence a fresh affidavit controversy was a useless proceeding, and that it was therefore entitled to exercise its powers of adopting the report as authorized by the section. The case was one very suitable for the exercise of the powers above mentioned, and the report, under the reference ordered, enabled the Court to dispose of it with convenience and without the delay and expense attendant on a long trial with conflicting expert evidence.

The Court of Appeal having been satisfied that, at the time of the rehearing, there was no longer any breach of the statute, decided to reverse the decision of Kekewich J., but it is said by the appellants that it ought to have left the injunction standing instead of discharging it and requiring the undertaking in the order, which, it is said, is less onerous than an injunction. On the other hand, the respondents contend that to leave an injunction outstanding when the object with which it is granted has been accomplished is unreasonable and oppressive, and may impose difficulties on the respondents and the members of their board, and leave opportunities for motions to be made against the respondents for trifling or very temporary breaches, although there has been no suggestion of nuisance against the respondents, but only of statutory breach.

In the first place I do not construe the final order of the Court of Appeal as preventing the appellants from taking fresh proceedings if they think such proceedings necessary, but the respondents' undertaking being limited "to use their best endeavours," &c., might give rise to difficulties and be regarded as if the result of the litigation were to lessen the obligations of the respondents. Secondly, even if the Court of Appeal had left the injunction standing, it had power to suspend the injunction as might be reasonable—if, for instance, more time were required to finish works: see *Attorney-General* v. *Colney Hatch Lunatic Asylum*. (1) But here, where there was, at the time of the order of the Court of Appeal, no real need for an injunction, I agree with the Court of Appeal in getting rid of it. If this case had come before Kekewich J. on the facts presented to the Court of Appeal, I think he might have dismissed it, and I cannot help considering that the appellants' real point was that having once obtained their injunction it could not be got rid of by an appeal, although the facts had entirely changed between the two hearings.

A point was made by the appellants that in the earlier discussions before the Court of Appeal the respondents' counsel had not questioned the injunction, except with regard to storm-water, and therefore could not question it at the final hearing; but it is obvious that the respondents were admitting that they could not at the early stages dispute an injunction except with regard to storm-water, and were applying for time to complete the works, and that the final consideration of the matter stood over until they had had the opportunity of doing so, and I cannot read what was said in the discussions as debarring the Court of Appeal from rehearing the case fully when it came to decide it.

I should add that I do not think that any question arises on the facts found by the Court of Appeal as to whether the Court was bound or had discretion to grant an injunction.

(1) L. R. 4 Ch. at p. 163.

Looking broadly at this case, it seems to me that it was one in which for a time there was a statutory breach for which an injunction could be obtained, but that that breach was rectified before the final decision. The respondents had made every effort to cope with the difficulty, had expended large sums in doing so, and had, according to the facts found, been successful. They have been ordered to pay the costs of the proceedings so far.

The result is that in my opinion there was nothing to prevent the Court of Appeal from discharging or moulding the injunction as it thought fit in the circumstances, or taking an undertaking in lieu of an injunction, but the undertaking should not give rise to question as to lessening the future duties of the respondents.

I think the proper order to make should be: "The House being satisfied by the report of Sir William Ramsay that the sewage effluents from the defendants' works which enter the river Tame after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious matter and other foul or noxious matters that they did not affect or deteriorate the purity of the water in such river (1.) at the points of entry, or (2.) within a distance of 600 yards therefrom; and the House being of opinion that so long as that result is maintained the operations of the defendants are not in contravention of the requirements of the Public Health Act, 1875, and the defendants undertaking that these results shall be maintained in future; Set aside the said judgment of 21st November 1907 so far as the same granted an injunction, with liberty for the plaintiff, in case of any breach of the foregoing undertaking, to apply for an injunction, and generally as he may be advised."

I think the order appealed from should be varied accordingly if the respondents are willing to give, and give, the undertaking which I suggest. If an application were made in case of breach of the undertaking the Court could consider and deal with the matter without the delay of a fresh action.

If, however, the respondents are unwilling to give the said undertaking, it seems to me that the only alternative is to allow the injunction to continue and to restore the order granting it.

The question of costs your Lordships will, I suggest, dispose of when the order is finally made.

LORD ROBSON. My Lords, it is not disputed that in this case the Attorney-General properly took proceedings against the respondents, and that, at the date of the injunction granted by Kekewich J., the wrongs complained of by the relators were in operation, so that there was substantial ground for the injunction, but the circumstances were of a very exceptional character, and I have come to the conclusion that the Court of Appeal was, on the whole, justified in the course it took. It gave the respondents further time in which to complete new works with the view of removing the grounds of complaint; it then heard evidence led by the parties as to the practical sufficiency of those works; that evidence being contradictory, it decided to avail itself of expert assistance in coming to a conclusion upon it, and being satisfied by means of such assistance that the grounds of complaint no longer existed, it discharged the injunction.

The appellants say (1.) that the Court of Appeal had no jurisdiction to discharge an injunction properly granted by the Court of first instance; (2.) that the form of reference to the expert and the procedure adopted thereunder were not within the jurisdiction of the Court without the consent of the relators, and that there was no such consent; (3.) that the Court was wrong in refusing to let its expert's report be made the subject of further contentious affidavits; and (4.) that the additional time granted to the sewage authority was upon the condition or understanding come to by the parties in the presence, and with the approval, of the Court that the injunction should in any event stand to a certain agreed extent, namely, as to the dry weather flow.

First, as to the jurisdiction of the Court to discharge on appeal an injunction originally granted on good grounds by the Court below. By ss. 19 and 23 of the Judicature Act, 1873, the Court of Appeal has all the power, authority, and jurisdiction of the High Court of Justice, to be exercised according to the rules or orders of the Court made in pursuance of the Act. Under

Order LVIII., rr. 1 and 4, an appeal to the Court of Appeal is by way of rehearing, and, in dealing with questions before it, the Court has full discretionary powers to receive further evidence even as to matters which have occurred after the decision appealed from, if, upon special grounds, it thinks such evidence material to be considered. It may then make any order which ought to have been made, and may make also such further order as the case may require. The Court of Appeal in the present case had therefore jurisdiction to do whatever might have been done, and in its opinion ought to have been done, by Kekewich J. If the better course would have been for that learned judge to postpone his decision as to the granting of an injunction until the new scheme of works then in progress and specially designed to remedy the statutory offence complained of had been finished and fairly tested, the same course was equally open to the Court of Appeal on the rehearing. If Kekewich J. had thus postponed his decision he might have exercised his discretion as to the grant or refusal of an injunction on a much later and much more material state of things than that which existed at the time of his judgment. The Court of Appeal could therefore do the same thing, and that is the course it in fact adopted. It satisfied itself that, during the postponement it had granted, the need for the injunction had gone, and it exercised its discretion in reference to affairs as they stood when it came finally to decide the case. Unless it departed in some way from the prescribed procedure, there has therefore been no excess of jurisdiction.

The first hearing of the appeal was on July 13, 1908. At that time the view of the Court was that, though the respondents, the Birmingham sewage authority, might have so far improved their works as to deal efficiently with the normal or dry weather flow of sewage effluent into the river, yet an unusual fall of rain-water, or storm-water as it was called, brought about a degree of pollution of the river which amounted to a breach of the statute, so that the injunction in general form could scarcely be resisted. Holding that view, the Court itself suggested that the appeal might stand over for six months on the sewage authority undertaking to proceed with the new works then in hand which would enable them to deal with the storm-water flow. To this the relators assented, and the Master of the Rolls added that Kekewich J. was right in the injunction he had granted, and that it had now become a question of storm-water only.

On January 12, 1909, the case was again before the Court of Appeal, and counsel for the respondents admitted that, as to the dry weather flow, they worked under the injunction, and desired only to be protected against sequestration in respect of anything beyond it, that is to say, the storm-water flow. Great works involving an immense expenditure were then being carried out by the sewage authority, but they were still incomplete, and further time was granted to the respondents. The Master of the Rolls then told the relators that the Court was "not disposed *at present* to deprive you of the pressure an injunction puts on the defendants." He added that "Defendants must submit to the injunction *until* they satisfy us or some other tribunal that they have substantially fulfilled its requirements. Sir Robert Finlay does not ask that the injunction should be discharged *now*. Of course he could not. In any point of view we will not deprive you of the protection of the injunction."

The works were afterwards finished, and then began the war of affidavits as to their sufficiency. On June 11, 1909, the case came before the Court on those affidavits, and Sir Robert Finlay, for the respondents, then asked that the injunction should be forthwith discharged. The Court did not assent to that application. There was a question of fact to be decided on the affidavits, and the Court thought it was "a matter to send down an expert about." The Master of the Rolls said that the Court was entitled, whether the parties consented or not, to send an expert down, and he added, I think with justice, that it would be a reasonable thing for these public bodies to facilitate that course.

Mr. Macmorran, for the relators, without consenting to an order being made, accepted the view, which I think correct, that his consent was not necessary; but a question arises as to whether, when once the Court had intimated its intention of making an order for inquiry and report, the relators did or did not agree to the procedure to be adopted on the inquiry.

Under s. 13 of the Arbitration Act, 1889, which replaces various repealed portions of the Judicature Acts dealing with this subject-matter, the Court has power, subject to rules of Court and to any right to have particular cases tried by a jury, to refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to a special referee.

Under s. 14 of the same Act it may in certain cases (which might include the present case) order any question of fact to be tried before a special referee.

By Order XXXVI., r. 55C, "the provisions of rules 48 to 55 of Order XXXVI. and of rule 55B shall apply, where any cause or matter or any question or issue of fact therein is referred to an officer of the Court or to a special referee or arbitrator." There is no doubt as to the application of the strictly judicial procedure prescribed in those rules to s. 14 of the Arbitration Act, 1889, which deals only with questions of fact referred for trial; but when the rules come to be considered, it is not so clear that they apply any such procedure to a reference for inquiry or report under s. 13, or that they affect that section at all except where it is expressly mentioned. It is, however, unnecessary to discuss that question and I express no opinion on it, seeing that, in my view, the parties expressly arranged the procedure adopted on the inquiry as being a much more prompt, convenient, and effective course than that which, it is now contended by the counsel for the appellants, ought to have been followed.

In fact, both parties very sensibly acted on the suggestion of the learned Master of the Rolls that, as bodies acting in the public interest, they should facilitate the operations of the expert. The relators certainly did not want the reference to proceed as a new judicial investigation, with counsel and witnesses. So far from demanding that, they themselves suggested a form of reference which they thought would meet the views of the Court. They were only anxious that the proposed expert should be an engineer instead of a chemist and secured the insertion in the order of reference of a provision that Sir William Ramsay should, on his first visit at least, be accompanied by the engineers of both sides to furnish him with information. In their letter sending the proposed form they also said that "any further visits expert may think necessary, he may pay with or without notice and at any hour he may select and accompanied by any assistants he may require." No demand or suggestion was ever made by the appellants that he should hear witnesses or proceed otherwise than in the way he did. Under these circumstances I think it is not open to the appellants to complain that the reference was conducted in a way that the Court of Appeal could not have directed without the consent of the parties. So far as the mode of procedure was concerned, the Court of Appeal had the consent of the parties, and the appeal on this head therefore fails.

Sir William Ramsay's report was in favour of the respondents. It was strenuously contested by the appellants, but it was, as might be expected, an able, careful, and conclusive report, and the Court of Appeal was well justified in relying on it for the purpose for which it was obtained, namely, to enable it to decide on the conflict of the affidavit evidence which was before it. It would have been entirely contrary to the object and agreed character of the reference if the report had been treated merely as the starting point for more contentious affidavits.

As to the alleged understanding to the effect that the injunction should stand at least as to the dry weather flow, there was, I think, nothing more than an expression of opinion by the Court at a certain stage of the case, that the injunction was well founded to that extent and should stand accordingly. The appellants say that it was on that footing alone they assented to the further time granted by the Court of Appeal to the respondents for the completion of their works. That is putting their contention much too high. The extension of time was suggested by the Court; it was most properly given; it ought, in my opinion, to have been given, and I should think it would have been given, whether the relators assented or not. The sewage authority in the performance of their public duty had already spent vast sums in honestly trying to meet the complaints which the relators in the performance of their public duty were as honestly making; they were then undertaking a novel and ingenious scheme involving a further enormous expenditure of public money with the same object, and, in such circumstances, they were entitled to all the help and consideration

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which the Court in its judicial discretion felt able to give them. Accordingly when Sir William Ramsay certified, to the satisfaction of the Court, the success of their efforts, the Court was justified in reconsidering its interlocutory expressions of opinion, and in deciding the question of the injunction according to the circumstances existing at the date of their judgment. The interests of the relators in regard to costs, both before Kekewich J. and in the Court of Appeal, were of course safeguarded, and if hereafter it should prove that, notwithstanding the existence of the new works, breaches of the statute in relation to this stream continue to take place, the relators will be in no way prejudiced so far as future proceedings are concerned.

It has been argued by the appellants that as this was an action by the Attorney-General the Court was bound, on a breach of the statute being shewn, to grant an injunction, and, in truth, possessed no discretion in the matter.

If that proposition means that in cases where the Attorney-General is concerned the Court is not entitled to allow a reasonable time within which to set the matter right, and, on its being set right, to refuse the injunction, I think it goes much too far. It is sufficient to say that no authority to any such effect has been cited to your Lordships, and it can scarcely be supported on principle.

My noble and learned friend, Lord Gorell, has suggested a new form of order, which agrees with the Court of Appeal in discharging the injunction and affirms the opinion of Sir William Ramsay, to the effect that the respondents are not now acting in contravention of the Public Health Act, 1875. It goes on to exact or invite an undertaking from the respondents that the existing results as described by Sir William Ramsay shall be maintained. I concur in this form of order. The respondents were not asked in the Court below to give any stronger form of undertaking than they gave there, but there seems no substantial reason why they should object to the form now proposed, which is in accord with their contentions before the Court of Appeal.

On July 26, 1912, this appeal came on upon further consideration as to the form of the order, and the following order was made:—

> *Ordered and adjudged that the order of the Court of Appeal of June* 22, 1909, *be affirmed: and this House being satisfied by the report of Sir William Ramsay that the sewage effluents from the defendants' works which enter the river Tame after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious matter and other foul or noxious matters that they did not affect or deteriorate the purity of the water in such river* (1.) *at the points of entry, or* (2.) *within a distance of* 600 *yards therefrom, and this House being of opinion that so long as that result is maintained the operations of the defendants are not in contravention of the requirements of the Public Health Act,* 1875, *further ordered that the order of the Court of Appeal of November* 19, 1909, *be varied by deleting therefrom the words "And the defendants by their counsel undertaking to use their best endeavours to prevent in future any breach of such statutory provisions," and inserting in lieu thereof the following words, "and the defendants undertaking that these results shall in the future be secured, perpetuated and maintained by them," and that, subject to the said variation, the said order be affirmed, and the appeal dismissed: and further ordered that the respondents do pay to the relators three fourths of the costs of the appeal.*
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> *Lords' Journals*, July 26, 1912.

Solicitors for appellant: *Braikenridge & Edwards, for Nevill & Matthews, Tamworth.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for E. V. Hiley, Birmingham.*

[PRIVY COUNCIL.]

J. C.*
1912
April 23;
July 3.

JOHN GEORGE WHITE . . . . PLAINTIFF;

AND

JAMES LESLIE WILLIAMS . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Construction—Sale of Cargoes c.i.f.—Cost of Stevedoring to be paid by Purchaser—Shipowners' Contribution.

Where the consignees of two cargoes of coal sold them to the Government on c.i.f. terms, the latter guaranteeing their discharge, "cost of stevedoring to be paid by the Government," and it appeared that the consignees had previously to the knowledge of the purchasers agreed with the shipowners to effect the discharge, "steamer paying 1*s*. per ton towards cost of same":—

Held, that the finding of the Courts below that the purchasers' contract had been fulfilled by payment of the said cost less the stipulated contribution by the shipowners would not be disturbed.

APPEAL from a judgment of the Supreme Court (March 1, 1911).

The action was brought by the appellant under the "Claims against the Government and Crown Suits Act of 1897." The appellant had contracted to supply to the Government represented in the action by the respondent as nominal defendant on its behalf two shipments of coal at an inclusive price to cover cost, freight, and insurance, the Government guaranteeing the discharge of the steamers and undertaking to pay the cost of stevedoring. The contract is set out in their Lordships' judgment. By the charterparties the appellant was to effect the discharge of the steamers and to receive 1*s*. per ton towards cost of the same. The Government claimed to deduct that amount from the cost of discharge payable to the appellant, who contended that according to the true construction of the contract the whole cost of discharging the steamers should be borne by the Government, who were not entitled to the benefit of contributions from the owners payable to the appellant under contracts to which the Government was not a party.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

Pring J. on December 15, 1910 (sitting as judge of the Commercial Causes Court without a jury), gave a verdict for the defendant. On March 1, 1911, the Full Court dismissed a motion for a new trial or that the verdict should be entered for the plaintiff.

The material passage of the judgment of the Chief Justice is as follows:—

"It seems to me that the question which is decisive is: What meaning is fairly to be attached to the terms of the contract embodied in the correspondence of the 16th December, 1909, and especially to this sentence used by the plaintiff and agreed to by the defendant—'The Government to guarantee to discharge the several vessels at not less than 500 tons per day, strike or no strike. The cost of stevedoring to be paid by the Government, and vessels to have free wharfage.' Now, considering the knowledge of the whole subject-matter then in the minds of the parties, what is a fair business-like interpretation of these words? It is only in so far as it may help to shew what was within the knowledge of both parties that I think the letter of 11th December, 1909, can be looked at at all. . . . It may, however, be gathered from the letter of the 11th December, 1909, that it must have been present to the minds of both parties that there was at any rate a possibility of the cost of unloading being lightened by a contribution from the shipowners . . . . and although there was then no certainty about it, they would have that possibility in contemplation when bargaining about the cost of discharge.

"Under these circumstances, what would naturally be supposed to be in the minds of the parties when in their contract they made use of the words, 'The cost of stevedoring to be paid by the Government and vessels to have free wharfage'? I do not think that there is any special limitation to be implied from the words 'cost of stevedoring'; they simply mean the cost of discharging the coal, which expense was to be taken off the shoulders of the vendors and undertaken by the purchasers. It does not mean anything more or less than this: that the vendors were to be relieved of the cost of unloading the ships, whatever that might be, and whether the whole or only a part of that expense would otherwise have had to be paid by them. This expense the vendors of the coal were not to bear. As it happens, the cost of unloading was lightened by an amount allowed by the shipowners. In these circumstances it appears to me that the contract was fulfilled by the defendants bearing those expenses, which would have fallen on the vendors if the contract had not been made. The cost of unloading was paid, less the 1*s*. per ton paid by the shipowners. To make good the contention of the vendors that they were to receive that 1*s*. per ton from the shipowners in any event, one would have expected to find something expressly relating to it in the contract."

Bailhache, K.C., and *D. C. Leck*, for the appellant, contended that on the true construction of the contract of December 16, 1909, the Government were bound as between themselves and the appellant to pay the whole cost of discharging the cargoes. Accordingly it was the appellant who was entitled to the benefit of the contribution towards that cost which was payable by the shipowners under charterparties to which the Government was not a party. The contract sued upon was not affected or altered by the terms of the charterparties and did not refer thereto, nor was it part of the bargain that the benefit of the stipulation in the appellant's favour contained therein should be transferred to the respondent. Reference was made to *Houlder Brothers & Co., Ld.* v. *Public Works Commissioner.* (1)

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the respondent, contended that on the true construction of this contract the Government was entitled to the benefit of this stipulation. The effect of the contract was to relieve the appellant from all liability in regard to the discharge of the coal. The Government therefore was liable to pay such part only of the cost as would have been payable by the appellant if the contract sued upon had never been made. Consequently the benefit of any contribution which the shipowners were bound under the charterparties to pay towards that cost passed to the respondent and must be

(1) [1908] A. C. 276.

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taken into account in estimating the amount payable to the appellant.

Bailhache, K.C., in reply.

The judgment of their Lordships was delivered by

LORD MERSEY. This is an appeal from an order and judgment of the Supreme Court of New South Wales dated March 1, 1911.

The question in the case turns entirely on the meaning to be given to the words "cost of stevedoring" as used in a contract for the sale by the plaintiff to the defendant (representing the Government) of two cargoes of coal on c.i.f. terms.

The contract is contained in two letters of December 16, 1909. The first of these letters is in the following terms:—

"I have the honour to offer to supply to your Government . . . . from Japan a cargo of . . . . lump coal, about 6000 tons . . . . to be dispatched per s.s. *Strathfillan* . . . . price 28*s*. 9*d*. per ton c.i.f. Sydney Harbour (and) about 4700 tons of Indian coal . . . . to be shipped per s.s. *Evandale* . . . . at Calcutta . . . . price 31*s*. 6*d*. per ton c.i.f. Sydney. The Government to guarantee to discharge the several vessels at not less than 500 tons per day, strike or no strike. The cost of stevedoring to be paid by the Government and vessels to have free wharfage."

The second letter, which was from the Government to the plaintiff, contained an acceptance of this offer.

Before entering into this contract the plaintiff had chartered the two vessels the *Strathfillan* and the *Evandale* by charterparties dated December 14 and 15, 1909. These charterparties contained clauses relating to the discharge of the coal to be carried. The clause in the *Strathfillan's* charterparty was as follows: "Consignees to effect the discharge of the cargo, strike or no strike, steamer paying 1*s*. a ton . . . . and providing only steam, steam winches, winchmen, gins, and falls."

And the clause in the *Evandale's* charterparty was as follows: "The cargo to be taken from the steamer's tackles at the risk and expense of the charterers and consignees, who will bear all risk and expense of lighterage, if any, at port of discharge . . . . Consignees to effect discharge of steamer irrespective of strike or labour trouble, steamer paying 1*s*. per ton towards cost of same."

The wording of these two clauses differs slightly, but they both mean the same thing. The ship is to provide the discharging appliances and the steam power required for working them ; but all the other labour in the hold (which but for the clause would fall to the ship to provide) is to be found by those who receive the cargo, the ship paying 1*s*. per ton towards the cost.

It appears that these or similar clauses are printed as part of the common form of charterparty in use in the coal trade, a blank being left for the sum to be contributed by the ship, which may vary according to circumstances.

The cargoes arrived and were taken delivery of by the Government, who did all that part of the work of discharging which is customarily done by the ship except in so far as that work consisted of providing gear and keeping up steam for winches. The Government paid the c.f.i. price to the plaintiff, but claimed to have credit for the 1*s*. a ton. The question is, are they entitled to it? The learned judge who tried the case held that they were, and the Court of Appeal affirmed the judge's decision.

It is said by the appellant that the Government were no parties to the charterparty contracts and cannot therefore claim any benefit under them, and this no doubt is true. But it is upon the construction to be put on the contract of December 16 for the sale of the coal that the respondent relies. What is the "cost of stevedoring" which the Government are to pay? It is certainly not all the money which would have to be disbursed if the ship did not contribute, for if it were the Government would have to pay for the use of the discharging appliances and for the supply of steam for working them. These are as much part of the cost of stevedoring as the wages of the men who work in the hold. But the plaintiff makes no claim to be paid either for the use of the appliances or for the steam. And why not? It is because when making the c.f.i. contract both parties knew that the ship was to contribute to the stevedoring by providing these things, and they contracted on that footing. They would also know of the practice or custom evidenced by the common form of charterparty that the ship would contribute towards the cost of wages, and they contracted on that footing also. Thus, when in the contract it is stipulated that the Government is to pay the "cost of stevedoring" the expression must in their Lordships' opinion be read as meaning so far as such cost is not provided by the ship in the way of tackle or steam or in money. The Chief Justice in delivering the judgment of the Supreme Court says: "The possibility, however, of some part of the cost of discharging being paid by the shipowners must have been present to both parties, and although there was then no certainty about it, they would have that possibility in contemplation when bargaining about the cost of discharge."

This finding of fact by the Supreme Court is probably in accordance with the understanding on which business men contract in the trade. It appears clear from the terms of the two charterparties that both the plaintiff and the shipowners contemplated that the shilling a ton should be paid to those who undertook the work of discharge; and if the shipowners had paid the money to the respondent they could as against the plaintiff have justified the payment as being exactly in accordance with the charterparty contracts. As between plaintiff and shipowner it was never contemplated that the plaintiff, who did no part of the discharging, should receive and retain the ship's contribution towards the cost of it; and though it is true that the charterparties create no privity as between plaintiff and the defendant, their terms, which are in common use in the trade, serve to throw light upon the meaning to be put on the words "cost of stevedoring" as used in the contract of sale.

The question is more one of fact than of law, and their Lordships do not think it right to interfere with the finding of the Courts below. They will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *William A. Crump & Son.*
Solicitors for respondent: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.*
1912
May 14, 15; July 10.

COMMERCIAL CABLE COMPANY . . . . DEFENDANTS;

AND

ATTORNEY-GENERAL OF NEWFOUNDLAND PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Newfoundland Act 5 Edw. 7, c. 7—Taxation of Telegraph Cables landed in the Colony—Construction—Company not carrying on Business in or from the Colony.

Newfoundland Act 5 Edw. 7, c. 7, imposes taxation on every telegraph company carrying on telegraph business in or from the Colony in respect of every telegraph cable (not exceeding five) landed thereon or established therein :—

Held, that the appellant company, which by contract with the Government in 1905 (confirmed by 6 Edw. 7, c. 10) was prohibited from competing with the Government or transmitting or receiving business from or to the Colony without its permission, and which never attempted to transgress the restriction, was not liable to taxation under the said Act in respect of its cables landed on the Colony.

APPEAL from a judgment of the Supreme Court (May 8, 1911) directing the appellants to pay $16,410, the amount of a tax due for 1909–10 under the Newfoundland Telegraph and Telephone Company's Act (5 Edw. 7, c. 7).

The main question decided was whether the appellant company was liable on the true construction of the Act, the material sections of which are set out in their Lordships' judgment, and depended upon whether it carried on its telegraph business in or from the Colony.

The respondent by his action claimed $16,000 and interest in respect of four telegraphic cables landed on the island of Newfoundland. The appellants paid into Court $8000 in respect of two cables and pleaded that the company was not liable, as it did no business in the Colony.

The Supreme Court decided that the appellants were liable. Horwood C.J. and Emerson J. found on the evidence that the company used a station at Cuckold's Cove in the Colony for the purpose of its ordinary telegraph business, and that each of the four cables which it had landed there was capable of being used and was sometimes in fact used separately from any of the others for the transmission of messages between Newfoundland and the continents of Europe or America. They held that each of the four cables was liable to be taxed as a telegraphic cable, and that to hold otherwise would be to disregard a previous decision of the Court in *Attorney-General* v. *Anglo-American Telegraph Co.* (1) Johnson J. held that the respondent's claim was satisfied by the amount paid into Court. The appellants were liable only in respect of their New York cable, which must be deemed to be two cables, since without being landed on the Colony to reinforce its electric current it could not have been successfully laid to New York. As regards the cable known as the Canso cable the appellants were not liable, for they did no business in the Colony on that cable, which was used exclusively for through messages from Great Britain to Canso.

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

Sir R. Finlay, K.C., and *Geoffrey Lawrence*, for the appellants, contended that the evidence shewed that the four cables were landed at Cuckold's Cove on the terms that they were not to be used without the permission of the Government. They referred to an agreement between the Government and the company dated August 26, 1905, which was confirmed by 6 Edw. 7, c. 10. The evidence also shewed that in fact they have not been used for collecting any messages from the public in the Colony, or for transmitting any messages to the public in the Colony. Consequently the appellant company does not fall within the definition of company contained in s. 1 of the taxing Act. The cables were landed in Newfoundland for the convenience of both the Government and the company in its through business between Europe and America, not for the purpose that the company should do business in the Colony.

Furlong, K.C., and *Raymond Asquith*, for the respondent, contended that the evidence shewed that the appellant company is a company carrying on business in and from Newfoundland.

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(1) (1907) N. L. R. 290.

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1912
Commercial Cable Company v. Attorney-General of Newfoundland.

Before June 30, 1910, there were established in the Colony four telegraphic cables between the Colony and places outside the Colony which were owned and worked by the appellants. Each of them had a separate battery and a separate earth connection and was physically a complete cable. By means of suitable mechanism known as the Taylor-Brown-Dear-Love relay messages transmitted by cable No. 1 are automatically transferred to cable No. 2 and vice versa, and by similar means those transmitted by cable No. 3 are automatically transferred to cable No. 4 and vice versa. If the relay is out of order the required transference is effected manually by operators maintained at the huts erected in Cuckold's Cove for that purpose. The evidence shewed that messages received at the hut by all the cables were there recorded on tape, filed, and preserved for purpose of reference and other purposes connected with the company's business. Besides, it is mechanically possible to use the cables separately for the transmission of messages from or to Newfoundland. Messages have been so sent for the Government over each one of the four cables separately between the Colony and places outside the Colony. It was contended that the company was within the definition contained in s. 1 of the taxing Act.

Sir R. Finlay, K.C., in reply.

1912
July 10.

The judgment of their Lordships was delivered by

Lord Macnaghten. In June, 1905, when the Newfoundland Legislature passed the taxing Act which imposes a tax on telegraphic cables, the only telegraph company doing business in the Colony was the Anglo-American. That company, as the successors of the New York, Newfoundland, and London Telegraph Company, still possessed special rights and privileges in the island, including the right to compete for traffic with the Government. But the exclusive right of landing cables on the island which had been enjoyed by the company and its predecessors for the period of fifty years had just expired.

The Anglo-American Telegraph Company had land lines in Newfoundland as well as submarine cables connecting Newfoundland with Ireland on the one hand and with Cape Breton Island on the other.

The Commercial Cable Company had several transatlantic cables connecting Ireland with Canso in Nova Scotia.

After the taxing Act was passed the Commercial Cable Company laid a cable for the Government of Newfoundland from Port-aux-Basques on the south coast of the island to Canso.

On August 26, 1905, a contract was made between the company and the Government for the maintenance and operation of this submarine cable and for the interchange of traffic at Canso.

By this contract the Government agreed to grant to the company the right to land any of its through cables on Newfoundland upon terms and conditions as favourable to the company as those under which any other cables, present or future, were granted landing rights and privileges by the Government, save and except any special privileges then enjoyed by the Anglo-American Telegraph Company inclusive of the right of that company to compete with the Government telegraph system. But this concession was subject to a condition or restriction expressed in the following words :—" It being understood and agreed that the company shall not compete with the Government for traffic, nor transmit nor receive business from or to Newfoundland without the permission of the Government unless and until the privilege so to compete and transmit and receive be granted by the Government to any other cable or cables which may hereafter make connections with Newfoundland."

Then in clause 5 the contract provided that in the event of the company (with the permission of the Government) landing cables as thereinbefore provided, it should be optional with the company to transfer at its Newfoundland station instead of at Canso a part or the whole of the traffic exchanged with the Newfoundland Government system, provided that the terms of transfer at the Newfoundland station should be the same as at Canso.

By the Act 6 Edw. 7, c. 10, which was passed on May 10, 1906, the contract of August 26, 1905, was approved and confirmed, and it was enacted that the Governor in Council might grant lands not exceeding a specified quantity to the company in fee simple and without charge for the purpose of erecting cable stations and cable houses.

Afterwards, on the invitation of the Government, the company cut two of its transatlantic cables at a point in the ocean on a bank known as the Flemish Cap and extended those cables westward by means of new cables to Newfoundland, continuing them westward, one to a point in or near New York and the other to Canso. These through cables were landed on Newfoundland at a point on the shore near St. John's called Cuckold's Cove. In a hut there the cables were relayed by a process known as the Taylor-Brown-Dear-Love system. By that system the through cable being divided into two sections, the section coming from the east is connected to the apparatus which receives the signals and automatically repeats them into the section going to the west and vice versa, so that the service is continuous although each through cable is composed of two sections. In this hut the company maintains a staff of twelve men to transmit messages by hand in case of a breakdown in the automatic system.

The taxing Act, 5 Edw. 7, c. 7, passed on June 15, 1905, is entitled "An Act to increase the Revenue by imposing Taxes upon business transacted by Telegraph and Telephone Companies within and in transit through the Colony."

The preamble recites that "It is desirable to increase the revenues of the Colony by the imposition of taxes upon telegraph, telephone, and cable companies doing business in the Colony, and upon companies owning stations transmitting or receiving messages in or from the Colony by wireless methods of telegraphy."

Sect. 1, so far as material to the present question, is as follows: "(1.) In this Act 'company' shall mean any company corporate or unincorporate, or person carrying on any telegraph or telephone business in or from the Colony."

Sect. 2 contains the following enactments: "2. Every company shall pay to His Majesty, his heirs and successors, for the public uses of the Colony on 30th day of June in each year the sums following, that is to say:—(1.) A sum of $4000 in respect of every telegraphic cable between this Colony and any place outside this Colony for the time being belonging to or worked by or on behalf of the company which now is, or hereafter shall be, landed on, extended to, or established in this Colony, provided that no single company shall be charged upon more than five telegraph cables."

The question for the decision of this Board is whether the Commercial Cable Company is liable to taxation as a company carrying on telegraph business in or from the Colony.

If that question should be answered in favour of the Government, a subsidiary question arises which is rather in the nature of a conundrum. It is this: Are the through cables of the Commercial Cable Company multiplied by division? Are they to be reckoned as two cables or as four cables for the purpose of taxation?

Having regard to the date of the taxing Act and the date of the contract between the Government and the company and the privileges which the Anglo-American Company still retained, it seems not improbable that in framing the taxing Act the Government had in contemplation the very case which has occurred—the case of a company landing its cables on the island, but precluded for a time from carrying on business in or from the Colony. Be that as it may, the Commercial Cable Company was by the terms of its contract with the Government, which received legislative sanction, prohibited from competing with the Government or transmitting or receiving business from or to Newfoundland without the permission of the Government unless and until the privilege be granted to some other cable company. It is common ground that the Government has not granted the company permission to transmit or receive business from or to Newfoundland, and that it has not granted such permission to any other cable or cables. It is admitted that the company on its part has not transgressed, or attempted to transgress, the understanding or restrictive stipulation expressed in the contract of August, 1905.

In these circumstances their Lordships are of opinion that the cables of the Commercial Cable Company landed on Newfoundland are not liable to taxation under the taxing Act as the cables of a company carrying on telegraph business in or from the Colony.

It seems to their Lordships that the term " business " used in the interpretation section of the taxing Act must mean business

J. C.
1912
Commercial Cable Company v. Attorney-General of Newfoundland.

in the ordinary or commercial sense of the word. Otherwise the section has no meaning. For, while, of course, it was competent for the Newfoundland Government to impose taxation on cables within its territorial jurisdiction, it was not competent for the Government to lay a tax on cables outside its territorial jurisdiction, and if the taxing Act bears the construction for which the Government contends no interpretation clause was needed.

The leading counsel for the Government advanced a very singular argument. He said the company did in fact do business within the Colony on more than one occasion. It seems that on more than one occasion the Government telegraphic system in Newfoundland broke down and the company came to the rescue. It allowed Government messages to be despatched from the hut at Cuckold's Cove. This was done at the request of the Government, and, as appears in the evidence, without prejudice to the rights of the parties. The company gained nothing by it, for it was stipulated by the agreement of 1905 that interchange of traffic in Newfoundland was to be on the same terms as the interchange of traffic at Canso.

Their Lordships forbear to comment on this argument.

Their Lordships are of opinion that the appeal should be allowed, and the action dismissed with costs both here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Budd, Johnson & Jecks.*

Solicitors for respondent: *Burn & Berridge.*

[PRIVY COUNCIL.]

THE KING . . . . PLAINTIFF;

AND

ALBERTA RAILWAY AND IRRIGATION COMPANY . . . . } DEFENDANTS.

J. C.*
1912
July 2, 3, 25.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Dominion Lands Act (*R. S. C.*, 1886, *c.* 54)—*Road Allowances—North-West Irrigation Act*, 1898—*Authority to intersect Road Allowances with Canals—Obligation to build Bridges at Points of Intersection.*

Under the Dominion Lands Act (R. S. C., 1886, c. 54) strips of Crown lands called road allowances were reserved from public sale and settlement, for the purpose of making roads when and as required.

Under the North-West Irrigation Act, 1898, the respondent irrigation company obtained authority to cross the road allowances met with in their route:—

Held, that the company when it exercised this authority was bound to build at its own cost the necessary bridges at the points where their canals intersected the road allowances and rendered them impassable. Sect. 37 of the Irrigation Act has no application to road allowances; it deals only with "public highways theretofore publicly travelled as such."

APPEAL from a judgment of the Supreme Court (May 15, 1911) reversing by a majority the judgment of the Supreme Court of Alberta in banc (March 15, 1910) which affirmed the judgment of the Supreme Court of Alberta (December 17, 1909).

The respondent company owns and operates a system of irrigation canals in the Province of Alberta. These canals intersect strips of land which in the general survey of the district were left as "allowances" for roads. At the points of intersection bridges had to be constructed. The question decided in this appeal was whether the appellant in right of the province or the respondent company is liable for their cost and maintenance.

The appellant by his pleadings claimed a judgment requiring the company to erect across its canals at points which he specified "proper and sufficient bridges with proper and sufficient approaches thereto so that the said highways may be conveniently travelled by the public." The Courts in Alberta in effect ordered that the company must either build bridges or fill up their canals at the intersecting points. The judgments in the Supreme Court are reported in 3 Alberta Law Reports, p. 70.

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* *Present:* VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD DUNEDIN, and LORD ATKINSON.

The statutory position of the company is as follows:

By its charter (Dominion Statute of 1893, c. 69) it was authorized to "excavate, construct, maintain and operate irrigation ditches or canals"; the following section being material.

"16. The exercise of the powers conferred by this Act shall be subject to any general Act passed by the Parliament of Canada and in force from time to time respecting irrigation."

The general statute respecting irrigation in force at the time of the construction of the company's canals was the North-West Irrigation Act, 1898 (61 Vict. c. 35). At that time the locality in question formed a part of the North-West Territories of Canada; it was not until 1905 that the Province of Alberta was constituted.

Under this Irrigation Act the Dominion Government took possession of all the water, either in lakes, rivers, or elsewhere, and provided for the grant of the use of it to companies or private individuals for the purposes of irrigation.

Sect. 37 provided that any person or company constructing works under the Act should erect bridges, fourteen feet in breadth, over any of the works which crossed "public highways theretofore publicly travelled as such," and should always thereafter maintain them.

Later provisions of the Act related to the procedure of application to the local Commissioner of Public Works, which was followed by the respondents asking for leave to cross the road allowances, and to the grant or refusal of such application by the Commissioner.

The majority of the Supreme Court, while adopting the view of the provincial Courts that the road allowances in question were highways at the time when the respondents' canals were constructed across them, held that, upon the true construction of the respondents' application for the construction of their works and the certificate of the Commissioner of Public Works of the North-West Territories as to the permission given to the respondents to cross road allowances, the obligation of the respondents to build bridges where their canals intersected public highways had been limited by the Commissioner to highways theretofore publicly travelled as such. They also considered that, though in their application the respondents had undertaken to build "the necessary bridge or bridges" at the points where their canals crossed these highways, the Commissioner had, by the terms of his certificate, made it unnecessary for the respondents to implement that undertaking with respect to these particular highways insomuch as they were not then publicly travelled.

Fitzpatrick C.J. and Idington J. dissented and observed that the only points indicated on the plan to which the application referred were the crossings of each road allowance, and also that the respondent company filed plans shewing two classes of bridges, the one 14 ft. bridges contemplated by s. 37, the other 12 ft. bridges which could only be intended for the crossing of road allowances which do not fall within s. 37, and came to the conclusion that there was a clear undertaking on the part of the respondent company by this application to build bridges at the points where road allowances were to be crossed by its canals, and that there was nothing in the certificate of the Commissioner which absolved the company from that undertaking, the reference to s. 37 being made ex abundanti cautela.

Lafleur, K.C., *S. B. Woods, K.C.*, and *Geoffrey Lawrence*, for the appellant, contended that the decision of the majority of the Supreme Court should be reversed and the judgments of the provincial Courts restored. By the true construction of the legislation relating to highways in the North-West Territories road allowances reserved under the Dominion Lands Act (R. S. C., 1886, c. 54) became highways from the moment that the survey was approved. The evidence shewed that the road allowances in suit were at the present time being used as highways, though at the time of the construction of the respondents' works they were not travelled as such. It is a principle of the common law that a person authorized by statute to obstruct a highway is bound in the absence of an express provision to the contrary in the authorizing statute to furnish the public with a substitute for the highway. Sect. 37 of the Irrigation Act of 1898 neither expressly nor impliedly curtails this obligation. And in construing that section it should be noted (see ss. 11, 16, 24, 37) that the Dominion Parliament had no intention to deprive the local Legislature of their jurisdiction and control over road allowances, which had been transferred to it by Dominion Lands Act Amendment Act, 1892, s. 6, and North-West Territories Amendment Act, 1892, s. 20. As regards the effect of the respondents' application to the Commissioner of Public Works and his grant of a certificate it was contended that that official had no power to permit the respondents to cross road allowances except on terms which would in effect preserve them as highways and the inchoate rights of the public therein. It was contended that nothing had occurred to relieve the respondents of their common law liability to furnish the public with a substitute for the highways which they had destroyed by their canals.

Sir R. Finlay, K.C., *Ewart, K.C.*, *E. F. Hoffner*, and *W. Finlay*, for the respondents, contended that they were under no obligation, either statutory or at common law, to provide bridges whenever circumstances rendered them necessary or desirable. The only statutory authority relating to the question at issue is s. 37 of the Irrigation Act, which dealt only with bridges at the intersection of travelled roads and had nothing to do with the road allowances in suit. The dissenting judges of the Supreme Court had held that under the terms of the respondents' application to the Commissioner and his consequent grant of a certificate they had offered, and the Commissioner had accepted their offer, to build bridges at every point at which the canals crossed the road allowances. It was contended that, on the evidence as to what took place and of the local authorities subsequently building bridges over the canals at their own expense, and of various physical difficulties or other peculiarities of the land at some places of intersection, no such agreement was come to or could have been contemplated. Then with regard to the common law obligation relied upon, that relates only to public highways, and

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there is a broad distinction between these road allowances in suit and public highways. That distinction is recognized in the plaintiff's statement of claim, by the judgment of the Alberta Courts, by the Alberta Act 9 Edw. 7, c. 4, s. 2, which declares for the first time in 1909 that all road allowances "shall be common and public highways," and by the dissenting judges of the Supreme Court, who agreed that "every road allowance is not a public highway." The distinction is also recognized in various Dominion statutes. The respondents did not interrupt any road traffic, for it was admitted that when the works in question (see the Irrigation Act, s. 2 (*g*)) began to be used for the conveyance of water there was no public traffic along the road allowances in suit and that the same had not been adopted by the public as highways. The common law obligation did not apply having regard to the circumstances of the case, and because the respondents did not interfere with any highways or interrupt any traffic.

Lafleur, K.C., in reply.

1912
July 25.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the Supreme Court of Canada reversing by a majority of three learned judges to two the unanimous Supreme Court of Alberta, which affirmed the judgment of the trial judge.

The question is whether the provincial Government or the respondents, the irrigation company, who were defendants in the action, are bound to construct the necessary bridges at the points where the company's canals intersect the road allowances reserved throughout the Province of Alberta under the Dominion Lands Act, R. S. C., 1886, c. 54.

The action is concerned with two typical cases. In both the company obtained permission to construct irrigation works in accordance with deposited plans which shewed the points of intersection. In the one the proceedings were regular throughout and complete. In the other it would seem that some one or more of the directions and formalities prescribed by the North-West Irrigation Act, 1898, or the rules made thereunder, were not complied with. No relief, however, was asked on that

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ground. The claim in both cases is for an order or judgment requiring the company to erect across its canals at the points of intersection proper and sufficient bridges with proper and sufficient approaches thereto.

By their statement of defence the company admitted the allegations contained in the statement of claim and admitted further that unless the company were entitled to interrupt public travel, as the statement of claim alleged they had done, the plaintiff was entitled to the relief claimed.

The case may be summed up in a few words.

Road allowances are strips of Crown land reserved from public sale and settlement. They were reserved originally for the sole purpose of making roads when and as roads might be required.

Before the road allowances were wanted for roads, the irrigation company obtained authority under the North-West Irrigation Act, 1898, to cross the road allowances met with in their route. This authorization necessarily gives the company the right to occupy the road allowances at the points of crossing and to dig out the surface of the land there for the purposes of their irrigation works.

Thereupon the land at a crossing which was originally vested in the Crown for one single purpose comes to be vested for two purposes—diverse and to some extent antagonistic—both touching closely the interest of the public and both perpetual: (1.) the convenience of wayfarers and travellers; and (2.) the improvement of the country by irrigation. The first, however, is still the primary and paramount purpose. The second is subordinate, for the land is not freed from the original purpose when the company obtains authority to take possession of it; nor, indeed, can it be freed from that purpose except by or in pursuance of some statutory enactment. The suggestion that the original purpose comes to an end on the expiration of the period allowed for the construction of the company's works is really not arguable.

Then there comes a time when the road allowances are wanted for roads. Who is to enforce the obligation of restoring them to a condition suitable for that purpose or otherwise doing what may be necessary to give effect to the original purpose—if there is a dispute about it? Clearly, the Attorney-General on behalf of the Crown. How is the obligation to be worked out? Due regard must be paid to both the purposes for which the land is held. The obvious and proper thing is to build bridges at the crossings where the road allowances have been made impassable by the company's canals. Who is to build the necessary bridges? Surely the party for whose convenience and profit the road allowances have been interfered with. The company has power under the Irrigation Act to construct "bridges." The word "bridges" in that connection must mean "bridges over the company's canals where they interfere with roads or road allowances." The construction of the necessary bridges is therefore one of the purposes of the company's undertaking.

It follows that the stipulation about building the necessary bridges to which the company submitted on their original application is nothing more than a stipulation binding the company to do, as a matter of contract, what it would have been bound to do if there had been no submission.

The result therefore is just the same whether the company's proceedings have been regular, as in the case of No. 6, or irregular, as suggested in the case of No. 8.

Their Lordships may add that in their opinion s. 37 of the Irrigation Act, to which frequent reference was made during the argument, has no application to road allowances. It deals only with "public highways theretofore publicly travelled as such."

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court reversed, and the judgments of the Courts below (varied so as to conform to the order asked for by the statement of claim to which the company by their statement of defence admitted the plaintiff would be entitled if they failed in making good their defence on the point of law raised by them) restored without costs.

The costs paid under the order of the Supreme Court must be refunded, and there will be no costs of this appeal.

Solicitor for appellant: *George Hamilton.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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July 4, 5, 8, 24.

TORONTO AND NIAGARA POWER COMPANY Plaintiffs;

AND

CORPORATION OF THE TOWN OF NORTH TORONTO . . . . Defendants.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Power to erect Electric Wires and Poles in Streets—Municipality has no Right of Veto—Appellants' Incorporating Act, 2 *Edw.* 7, *c.* 107, *ss.* 12, 13, 21 *—Railway Act of* 1888, *s.* 90*—Railway Act of* 1906, *s.* 247*—Construction.*

Held, that by ss. 12 and 13 of their incorporating Dominion Act, 2 Edw. 7, c. 107, the appellants were empowered to enter upon the streets of the town of North Toronto without the consent of its municipal council for the purpose of erecting poles to carry power lines for the conveyance of electricity.

Held, further, that s. 90 of the Railway Act of 1888 as amended by the Railway Act of 1899 and by s. 247 of the Railway Act of 1906, the effect of which would be to give the respondents a veto upon the appellants' exercise of their powers, is inconsistent with the said ss. 12 and 13 of the special Act, and consequently by s. 21 thereof is rendered inapplicable to the appellants. Sect. 247, moreover, applies only to companies within the definition clause of the Act of 1906, that is, to railway companies; while ss. 3 and 4 thereof save the appellants' powers under their special Act.

Appeal by special leave from a judgment of the Court of Appeal (February 1, 1912) reversing a judgment of the Chancellor of the High Court (September 29, 1911) and dismissing the appellants' action.

The question decided was whether the appellants are entitled under the powers vested in them by their Act of incorporation (Canadian Act 2 Edw. 7, c. 107) to go upon the streets or highways of the town of North Toronto for the purpose of erecting poles to carry their transmission or power lines for the purpose of selling and distributing electric power.

On July 24, 1911, the appellants sued for an injunction to restrain the respondents from interfering with their work along

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* *Present:* Viscount Haldane L.C., Lord Macnaghten, Lord Dunedin, Lord Atkinson, and Sir Charles Fitzpatrick.

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Eglinton Avenue in the said town. The trial judge held that they were entitled as claimed subject to complying with certain requirements of the Railway Act of Canada. The Court of Appeal held that they were not so entitled without the leave and licence of the respondent corporation.

The provisions of the incorporating Act are summarized in their Lordships' judgment.

The trial judge considered that the provision in s. 13 of their Act that the appellants were not to incommode the public use of the streets only applied to the erection of the poles and not to the subsequent transmission of power, and he thought that the appellant company's undertaking to submit to the direction of the engineer of the Railway Board obviated the difficulty arising from the grave danger of stringing high voltage wires over telephone and other low voltage wires. He held that the appellants were bound to deposit a plan and book of reference of their proposed line, but that they did not require any further permission for the occupation of the public streets.

In the Court of Appeal Moss C.J., after an examination of ss. 12, 18, and 21 of the incorporating Act, s. 90 of the Railway Act of Canada, 1888 (51 Vict. c. 29), and its amendment by 62 & 63 Vict. c. 37, s. 1, re-enacted with additions by s. 195 of 3 Edw. 7, c. 58, and finally by s. 247 of R. S. C., 1906, c. 37, held that there was no inconsistency between the provisions of ss. 12 and 13 of the incorporating Act and those of s. 90 of the Railway Act, 1888, as amended. His decision accordingly was that the appellants were bound to obtain the consent of the respondent corporation before erecting their poles. The remaining judges concurred, Maclaren J. adding that the question was governed by s. 247 of the Railway Act, 1906, which made it obligatory on the appellants to obtain the respondents' consent and to submit to the supervision of such person as they might appoint subject to an appeal to the Railway Board.

Nesbitt, K.C., *Atkin, K.C.*, and *McCarthy, K.C.*, for the appellants, contended that the powers given to them by their Act of incorporation were full and complete and clearly included a power to erect poles on the highways of the respondent

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corporation without their consent. The appellants were the first company to undertake the distribution of Niagara power in the Province of Ontario. Their Dominion Act of incorporation gave them special rights to enable them to carry out their undertaking which the Act declared to be for the general advantage of Canada. Sects. 12 and 13 were referred to. It was contended that s. 90 of the Railway Act of 1888 did not apply, for s. 21 of the incorporating Act only rendered it applicable to the appellant company and its undertakings so far as it was not inconsistent with the provisions of the said Act. The ruling of the Court of Appeal that the consent of the municipality was necessary defeated the object and intent of the Dominion Parliament in giving to the appellants their statutory powers. Further the provisions of s. 90, applicable to a railway company possessing powers ancillary to its main object of constructing and maintaining lines for the conveyance of power or electricity, were not intended to apply to a company like the appellants, the main purpose of whose existence was to construct and maintain such lines in order to furnish electricity or power "through over along and across any public highway." Reference was made to *City of Montreal* v. *Standard Light and Power Co.* (1) It was not the intention of the Legislature by that section so completely to cut down the appellants' exercise of their special statutory powers as to make their very existence dependent upon the will of the various municipalities within the territory which they were authorized to supply with electricity. If such intention had existed it would have been clearly expressed by apt words in the special Act. Even if the consent of the municipality were necessary it could not be arbitrarily withheld. No machinery exists for restraining a municipality from arbitrarily or improperly withholding its consent. The Board of Railway Commissioners had no power to interfere, and had so determined in regard to the present contention.

Sir R. Finlay, K.C., and *T. A. Gibson, K.C.*, for the respondents, contended that there was no inconsistency between the provision in s. 90 of the Railway Act of 1888 as amended by s. 195 of the Railway Act of 1903 and s. 247 of the Railway Act

(1) [1897] A. C. 527.

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of 1906, to the effect that the appellants must obtain the consent of the municipality concerned, and the provisions in ss. 12 and 13 of the appellants' incorporating Act. Consequently s. 90 or its later substitute applies, and therefore the appellant company must as a condition precedent to the exercise of its statutory powers apply for and obtain the consent of the municipality which has jurisdiction over the highway on which they propose to erect their poles and wires. Large powers were given to the appellants by their incorporating Act, and it was most necessary that such powers, exercisable as they were in large cities such as Toronto and Montreal, should be exercised under adequate supervision. The respondents were entitled and bound in the interests of public safety to stop the unauthorized erection of poles and electric wires in the town of North Toronto. The appellants should have applied for the respondents' consent; if they had failed to obtain it, they should have applied to the Railway Board. The effect of the sections cited when read together is to give to the respondents in the first instance, and to the Railway Board on appeal, the power to decide whether the proposed poles would incommode the public use of the streets. It was not suggested that the respondents had in order to preserve such public user attempted to impose any unfair conditions on the appellants, in which case there would have been a remedy by appeal to the Railway Board under the incorporated provisions of s. 247 of the Railway Act of 1906.

Nesbitt, K.C., in reply.

The judgment of their Lordships was delivered by

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July 24.

VISCOUNT HALDANE L.C. The question raised by this appeal is whether the appellants may enter upon the streets of the town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd, the trial judge, decided that they had such power, but subject to compliance with certain conditions. The Court of Appeal of Ontario reversed his judgment, holding that the appellants had no such power unless they had first obtained the leave and licence of the respondents. The only question which arises is as to the necessity of such leave and licence, and the argument depends

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entirely upon the construction of certain statutes of the Parliament of Canada. By their Act of incorporation, which was passed by the Parliament of the Dominion in 1902, the appellants were given powers which, if not cut down by other legislation, are sufficient to justify their action. The material provisions of the Act of incorporation may be summarized as follows. By s. 12 the appellants were, among other things, empowered to establish works for the production and sale of electricity, and to construct the lines of wire and poles which they might require. They were enabled to conduct and supply electrical power and to conduct it along wires at any places through, over, along, or across any public highway, and to enter upon any lands on either side of their wires or conduits, and remove trees or other obstructions, as well as to enter on private property and take such parts of it as were necessary for their lines of wire, poles, or conduits. In the event of the company taking private property, which they were empowered to do, certain provisions of the Railway Act, which by a subsequent section were incorporated, were, in case of disagreement or of questions as to damages, to apply.

By s. 13 the appellants were given power to erect poles and construct trenches and conduits and to do all things necessary for the transmission of power, heat, or light, as fully as circumstances might require, provided the same were so constructed as not to incommode the public use of streets, highways, or public places, and they were made responsible for all damage caused by them in the carrying out or maintenance of these works.

By s. 18 the appellants were empowered to make surveys and a map of the lands through or under which these works were to pass or be operated, they were empowered to make a book of reference for the works, and to deposit it, as required by the Railway Act with respect to plans and surveys, by sections or portions less than the whole length of the works, and on such deposit of the map or plan or book of reference of any such section or portion all the sections of the Railway Act were to apply as if the surveys and levels had been taken of the lands through or under which the whole of the works were to pass and the book of reference for the whole had been deposited.

By s. 21, ss. 40 to 61, s. 90, ss. 93 to 98, and ss. 136 to 169 of the then Railway Act, 1888, as amended by the Railway Act, 1899, were to apply to the appellants and their undertakings in so far as these sections were not inconsistent with the provisions of the Act of incorporation, and subject to the provision that wherever in the Railway Act the word "company" occurred it should mean the company by the Act of incorporation incorporated, and that wherever in the Railway Act the word "railway" occurred it should, unless the context otherwise required, and in so far as it applied to the provisions of the Act of incorporation, mean the works, conduits, lines, cables, or other works thereby authorized to be constructed.

The only one of the above sections of the Railway Act which affects this case is s. 90.

The Act of incorporation appears to their Lordships to give to the appellants, unless the powers which it prima facie confers are restricted by the Railway Act, very large powers which entitle the appellants to succeed in the present action. If it can be taken by itself their Lordships are of opinion that the Act shews that the Parliament of Canada treated the company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within s. 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For this there may well have been, on the balance of advantages, good reason—the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose. It is, therefore, not surprising that a pioneer company such as this should have been given large powers.

But while prima facie such powers were given, their Lordships collect from other legislation of the period that the Legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards was present to the minds of the draftsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public. The evidence in the present case shews the peril to the safety and the lives and property of the inhabitants of a populous district which a high voltage, such as that of a power company, might occasion. The Parliament of Canada, not unnaturally anxious to avoid dangers of this kind, accordingly passed general statutes conferring upon municipal authorities large powers of control. Sect. 90 of the Railway Act, 1888, was amended by the Railway Act, 1899, which added to it a sub-section illustrative of this kind of control. The new sub-section enacted that when any company had power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity, such company might, *with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place,* enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place. Certain further restrictions on the manner of exercise of these powers by the company then follow.

If the powers conferred by this section displaced the less restricted powers of entering without any consent conferred by the Act of incorporation the appellants are in the wrong. Their Lordships have, therefore, to determine this question. They have to bear in mind that a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes read as a whole.

The general Railway Act of 1888, as amended by that of 1899, was repealed and re-enacted with some modifications by the Railway Act of 1903, and this Act was in its turn repealed and re-enacted, again with some modifications, by the Railway Act of 1906. The Interpretation Act (R. S. C. 1, s. 20) provides that in such a case any reference in any unrepealed Act (e.g., in the present case the Act of incorporation) to a repealed Act is to be construed as a reference to the provisions of the substituted Act (in this case the Act of 1906), and that, if there is no provision in the substituted Act relating to the same subject-matter, the repealed Act is to stand good and be read as unrepealed in so far, and in so far only, as is necessary to give effect to it.

Turning then to the general Railway Act of 1906 in order to see what light its language throws on the question whether the powers originally conferred in 1902 by the Act of incorporation still stand unrestricted, the first observation to be made is that the draftsman has used language which expresses an intention to save all such powers.

By the definition section (2) " company " means a railway company, and " special Act " means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway. By s. 3 the general Act is to be construed as incorporated with the special Act, and, unless otherwise provided in the general Act, where the provisions of the general Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of the general Act. By s. 4, if in any special Act passed by the Parliament of Canada previously to February 1, 1904, it is enacted that any provision of the Railway Act, 1888, or other general Railway Act in force at the time of the passing of such special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited, or qualified, the corresponding provision of the general Act is to be taken to be excepted, extended, limited, or qualified, in like manner. By s. 247, when any company is empowered by special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or for the conveyance of light, heat, power, or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers, and may, subject to certain restrictions, break up the ground. If the company cannot obtain leave from the municipality it may apply to the Board of Railway Commissioners, and the Board has discretion to grant such leave.

Sect. 248 specially defines the word " company," for the purposes of that particular section, to include a telephone company, and imposes restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place in any city, town, or village, without the consent of the municipality. The materiality of this section, which is to apply notwithstanding any provision of any Act of the Parliament of Canada, is that it shews that where the Legislature intended to interfere with the powers of companies other than railway companies it did so by special provision.

Sect. 247, in the opinion of their Lordships, applies, so far as the wording of the section itself is concerned, only to companies within the definition clause, that is to railway companies. Railway companies may have powers to construct lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity. When they have such powers, and no special power to enter on municipal property, the section empowers them to do so, if the municipality consents, and under restrictions. But if by its special Act the railway company has been in terms given larger and less restricted powers of the same kind, ss. 3 and 4 already referred to shew that these special powers are saved. An exception to this appears in sub-s. (*g*) of s. 247, where the Board of Railway Commissioners is given jurisdiction to abrogate rights given by the special Act to the extent of requiring the lines to be placed underground.

As to this sub-section, two observations must be made. The first is that no question of its application is raised in this litigation. The second is that the application of the sub-section is excluded by the wording of s. 21 of the Act of incorporation It is inconsistent with the provisions of that Act, for it is in reality only one of the provisions of the Railway Act of 1906 relating to railway companies, and is therefore excluded.

The only way in which s. 247 of the Railway Act of 1906 is applicable to the appellants is by the language in which it is made applicable by s. 21 of their special Act. But if the provisions of s. 90 of the Railway Act, 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903 and 1906, are, as appears to be the case, kept alive by the Interpretation Act, these provisions are declared by s. 21 of the special Act applicable only in so far as

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they are not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in s. 21 make ss. 3 and 4 of the Railway Act, 1906, apply, so that the provisions of the appellants' Act of incorporation override and extend the provisions of s. 247. In the result it appears to their Lordships that the powers conferred by ss. 12 and 13 of the Act of incorporation of 1902 remain intact.

In the Courts below the trial judge decided in favour of the appellants on the question of power to enter and erect their poles without consent. A point was discussed as to the deposit of plans under s. 18 which it is now agreed does not arise.

The Court of Appeal took a different view. They held that the general restrictions imposed by s. 90 of the Act of 1888, as amended by the Act of 1899, and by s. 247 of the Act of 1906, were not inconsistent with the provisions of ss. 12 and 13 of the Act of incorporation.

For these reasons their Lordships cannot agree with this opinion. They will therefore humbly advise His Majesty that this appeal should be allowed, and that it should be declared that the appellants are entitled to a declaration that they are at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton Avenue without the consent of the respondents, and to have the latter restrained from interfering with them in doing so. The respondents must pay the costs of this appeal and in the Courts below.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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July 4, 22.

SAMSON . . . . DEFENDANT;

AND

AITCHISON . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Action for Damages—Negligent Driving of a Motor Car—Retention of Control by the Owner.

> Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving.

APPEAL from a judgment of the Court of Appeal (August 9, 1911) affirming by a majority a judgment of the Supreme Court (February 1, 1911) whereby the appellant was adjudged to pay 750*l*. damages and costs.

The action was brought by the respondent to recover damages for personal injuries occasioned by the negligent driving of a motor car in the city of Dunedin on April 8, 1910, in circumstances detailed in the judgment of their Lordships. The judge directed the jury that if they found that Collins, the actual driver of the car, was negligent, his negligence was that of the defendant, who was the owner of the car present therein. Under this direction the verdict was given.

The point of law having been reserved, the judge held that the appellant at the time of the accident stood in the relation of master to the driver, and gave the respondent judgment for the amount of the verdict.

The Court of Appeal (Chapman, Denniston, and Edwards JJ., Stout C.J. dissenting) affirmed this judgment.

Stout C.J. was of opinion that the defendant's responsibility ceased, the car being driven by Collins on behalf of his mother, the intending purchaser, who was in the car for the purpose of a trial up a hill, and it being in his view impossible to say that the car was being driven on the business of the defendant. On the other hand, Chapman and Denniston JJ. were of opinion that where an owner of a vehicle is found to have handed over the actual physical management of it to another person while himself remaining in the vehicle, there is evidence for the jury that the owner is liable for the negligence of the driver; that to get rid of his liability it is essential that the owner should shew that he has parted with the control of the vehicle in the sense of putting himself out of control; and that the defendant had failed to shew that he had so parted with the control; Denniston J. concluding his judgment by saying, "I think there is no evidence to displace . . . . the inference to be drawn from the fact that at the time of the accident the appellant was in the car and that Collins was then driving the car with the appellant's consent." Edwards J. was of opinion that the question was a pure question of fact, and summed up his reasons for his conclusion that the appeal ought to be dismissed in the following words: "But he" (Collins) "had not the possession of the car nor had he control of the car in any other sense than has any person who controls the movements of a vehicle with the consent of the owner, that owner being present in the vehicle, having the right and the power to direct the action of the person actually exercising the physical control and, if he pleases, to resume the physical control at any moment. I agree with the learned judge in the Court below that the case is quite indistinguishable from the case of *Wheatley* v. *Patrick.* (1)"

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* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

Jellicoe, for the appellant, contended that he was not liable. There was no evidence or suggestion that there had been any actual personal negligence or default on his part, or that the driver had been guilty of any act of negligence down to the moment of collision or had been acting under the directions given to him by the appellant. The appellant's ownership of the car and his personal presence on it were insufficient to render him responsible. He had not in law or in fact the control of the car, and the driver was not his servant or under his orders. It was submitted that under the circumstances it should be held that the car was under the care and control of the driver and his mother, the intending purchaser (also present therein), and that they were using and possessing it for their own purposes. He referred to *Jones* v. *Scullard* (1), *Sadler* v. *Henlock* (2), *Johnson* v. *Lindsay & Co.* (3), *Powell* v. *McGlynn & Bradlaw* (4), and *Wheatley* v. *Patrick.* (5) Mere possession without control was insufficient to create liability : see *Donovan* v. *Laing, Wharton and Down Construction Syndicate* (6); *Hardaker* v. *Idle District Council* (7); *Wing* v. *London General Omnibus Co.* (8); *Du Cros* v. *Lambourne.* (9)

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(1) (1837) 2 M. & W. 650.

Atkin, K.C., and *Tyrrell T. Paine*, for the respondent, contended that the evidence shewed that the car was in possession and control of the appellant and that there was no evidence to shew that at the time of the accident he had given up that control. The evidence shewed conclusively that Collins was driving with the appellant's permission and was subject to his control so long as he was driving, and therefore Collins' negligence was in law the negligence of the appellant.

Jellicoe in reply.

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of Appeal of New Zealand, dated August 9, 1911, affirming a judgment of the Supreme Court of New Zealand (Otago and Southland District) whereby the respondent was awarded 750*l.* damages and 97*l.* 6*s.* 4*d.* costs in respect of personal injuries inflicted upon her through the negligent driving of the appellant's motor car.

The person by whom the motor car was driven at the time of the accident, and who was guilty of the negligence, was one Albert Collins, the son of one Mrs. Collins, an intending purchaser of this car from the defendant ; and the sole question for decision is whether the majority of the Court of Appeal were right in holding that, having regard to the evidence, to the findings of the jury on the issues of fact left to them at the trial, and to those inferences of fact subsequently drawn by the trial judge in exercise of the power, by the consent of the parties, conferred upon him, the relation between Albert Collins and the appellant at the time of the accident was such as to make the appellant responsible for Collins' negligence. This again turned upon the question of fact whether or not the appellant had control over his car and over Collins, the driver of it, at the time the respondent was struck and injured. The facts, so far as material, are as follows. Mrs. Collins, who lives at Oamaru, some distance from Dunedin, was in the month of April, 1910, minded to buy a Ford motor car, and desired to obtain a loan of 100*l.* from the appellant to enable her to pay for it. On April 5 she came to Dunedin for the purpose of obtaining the loan, and next day had an interview with the appellant, who lives there. The latter expressed disapproval of Ford cars, offered to sell her at a certain price his own car, which then happened to be standing in the street outside his rooms, and took her for a run in it, he himself driving. Mrs. Collins' son, Albert, lived with his mother at Oamaru. He had been a chauffeur for two years, and his mother was anxious to have his advice and opinion about this car of the appellant's before purchasing it. She accordingly, after returning from the run in the car with the appellant, telephoned from the latter's office to her son to come to Dunedin. He did so, arriving the same evening. She and he called upon the appellant next morning, the morning of Thursday, April 7, the appellant took young Collins out for a run on this car, he, the appellant, himself driving. Nothing was then concluded. Mrs. Collins and her son returned next day, Friday, April 8. It was then arranged between the three that the car should be taken out and tested as a hill climber. Mrs. Collins and her son stated this suggestion came from Samson, the appellant. The latter stated, on the contrary, that young Collins required that the car should be submitted to this test. At all events, the three went out in the car at about 12 o'clock on this Friday. The appellant drove, young Collins sat beside him, Mrs. Collins sat behind. They drove through the town, over the cemetery hill, through a place called Caversham, and over a hill to another place called Green Island. About a third of the way up this latter hill, the appellant and young Collins changed seats, the latter taking the wheel and driving. Mrs. Collins and her son stated positively that the appellant on this occasion asked young Collins to drive. The appellant on the contrary alleged that the suggestion that young Collins should drive came from Collins himself. At all events, Collins did drive from the time the change was made till on the return journey they met with the accident in the town. On the day following the accident Mrs. Collins entered into an agreement in writing with the appellant to buy this car. Both Mrs. Collins and her son in the course of their evidence stated most positively that the appellant gave directions to young Collins while driving as to how and where he should drive, the rate he should proceed at, and the course he should take. To meet this proof of the exercise of control, the appellant set up what the trial judge, Williams J., has found to be an utterly false and dishonest case, to the effect that Mrs. Collins had in effect agreed verbally to purchase the car on Friday morning before they ever started on this trial run, that the car was in truth her property, and that her son, acting on her behalf as owner, determined to take the car out for his own satisfaction, and invited the appellant to accompany him as a passenger. The learned judge having come to this conclusion, not unnaturally, considered that the appellant's evidence was discredited by this incident, and accepted the account of each stage of the transaction given by Mrs. Collins or her son in preference to that given by the appellant, where the two were in conflict. The learned trial judge was of opinion that there was no evidence given at the trial that the accident happened "through any actual personal negligence" on the part of the appellant, and left to the jury the question of negligence on the part of Albert Collins. The jury found for the respondent (the plaintiff in the action), the question of the responsibility of the appellant for the negligence of young Collins being reserved for further consideration, the learned judge to have power to draw all necessary inferences of fact. Counsel on behalf of the appellant accordingly on December 16, 1910, moved before Williams J. that judgment should be entered in the action for the defendant on this ground amongst others, that "the defendant was not answerable for the negligence of the driver of the motor car." On February 1, 1911, the learned judge delivered judgment refusing this motion and directing a verdict and judgment to be entered for the plaintiff in the action for the damages found by the jury and costs. The learned judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: "I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne.* (1) The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control."

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(1) [1898] 2 Q. B. 565.
(2) (1855) 4 E. & B. 570.
(3) [1891] A. C. 371, 382.
(4) [1902] 2 I. R. 154.
(5) 2 M. & W. 650.
(6) [1893] 1 Q. B. 629, 633.
(7) [1896] 1 Q. B. 335.
(8) [1909] 2 K. B. 652.
(9) [1907] 1 K. B. 40.

And he then proceeded in the following passage to deal with the evidence in the case, and apply to it the principle of law he had thus laid down: "When, however, as in the present case, the owner being himself in actual possession of the equipage, simply hands over the reins or the wheel, he does not by so doing give up the possession of the equipage or his right of control of the way in which it is to be driven. Collins, when he took the wheel, came under the control of the defendant. It was in the interest of the defendant that Collins should drive, in order that he might make a trial of the car. If Collins drove in the ordinary way, the defendant, in his own interest, would not interfere with the driving, but there is nothing to shew or to suggest that the defendant had given up the right to control the way in which the car was to be driven if an occasion arose on which, in his opinion, it became necessary to exercise that control, or if for any other reason he desired to exercise it. If Collins had been going too quickly, and Samson had told him to go slow, and Collins persisted in going too quickly, Samson would have had the right to say to him: 'If you wish to continue to drive my car you must drive it as I direct, and if you will not do so you must cease to drive it.' In such circumstances Collins would have had to obey orders or cease driving. It does not follow because in any particular case it had not been found necessary to exercise a paramount authority, that such authority did not exist."

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(1) [1907] 1 K. B. 40.

In the opinion of their Lordships this amounts to a finding of fact that the appellant had not abandoned the control which they think prima facie belonged to him. The mere fact that he had asked or permitted young Collins, while he sat beside him, to drive the car is in their Lordships' view not enough to establish per se that he had abandoned control of his car. And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury. It appears to their Lordships that there is abundant evidence to sustain the conclusion to which the learned judge has come on this question of fact, the retention of control by the appellant. They not only see no reason for disturbing it, but think it is the right conclusion, one at which they themselves would have arrived. Their Lordships cannot, with all respect to the learned Chief Justice, concur in the view of the evidence expressed in the following passage of his judgment in the Court of Appeal: "There was, therefore, nothing requiring the appellant to interfere with or intervene in the driving or control of the car. Nor do I see that it can be said that this was a driving on the business of the appellant as in the case of *Wheatley* v. *Patrick.* (1) It was done for the purpose of testing the car, and while the car was being tested the accident occurred. It appears to me that to hold that Collins was acting as a servant or an agent or under the control of the appellant would be going beyond what has been decided in any of the cases referred to or that may be referred to, or to what is laid down in the various treatises on torts or negligence. The facts that he was to have a trial of driving up a hill, that the car was surrendered to his control for that purpose, and that his mother was in the car as well as the appellant, appear to me to differentiate this case from those relied on. Nor does it seem to me that, assuming Mrs. Collins and her son's evidence is true about the suggestions made as to driving by the appellant, it shews that the driving was under the appellant's control."

They think that in this passage the very fact in controversy is assumed to be true, namely, that the car was surrendered to the control of Collins for the purpose of the trial. There was to be a trial of the car as a hill climber, no doubt, but if the evidence of Mrs. Collins and her son be true there was no stipulation whatever, express or implied, that Collins should drive during the trial, or should have the control of the car while he drove it. On the contrary, they state that the suggestion that he should drive it came from the appellant during the progress of the run.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the appeal dismissed. And they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Metcalfe & Sharpe.*

Solicitors for respondent: *Paines, Blyth & Huxtable.*

(1) 2 M. & W. 650.

[PRIVY COUNCIL.]

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July 8, 9, 10, 11, 22.

ATTORNEY-GENERAL FOR ONTARIO AND OTHERS . . . . PLAINTIFFS;

AND

CANADIAN NIAGARA POWER COMPANY . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Covenant for Rental — Construction — Transfer of Land and Water for generating Electricity—Rental varying with Amount of Electrical Horse Power generated and used and sold.

By agreement in 1899, supplemental to an agreement in 1892, the respondent company agreed to pay a specified fixed rental for a strip of land lying by the water's edge in a public park, together with the use of a portion of the flow of the river as it passes, which had been placed at their disposal for the purpose of constructing works and generating electricity; and also additional rentals varying in amount by reference to the electrical horse power generated and used and sold or disposed of by the company, " such additional rentals as shall be payable for and from such generation and sale or other disposition " to be payable half-yearly:—

Held, that the basis of calculation, according to the true construction of the clause relating to additional rentals, was the highest amount or quantity of electrical horse power generated and used and sold or disposed of at any one time, and so remained until a higher point was reached.

APPEAL from a judgment of the Court of Appeal (January 17, 1912) affirming, with a variation in favour of the appellants, a judgment of Riddell J. (May 16, 1910).

The question decided was as to the true construction and effect of paragraph 2 of an agreement dated July 15, 1899, between the appellant Commissioners for the Queen Victoria Niagara Falls Park and the respondents, and set out in their Lordships' judgment.

The action was brought by the appellants to recover certain moneys alleged to be due from the respondents over and above those which had already been paid. The payments claimed were

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* *Present:* VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

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in addition to a fixed stipulated rental and were based upon and fluctuated with certain contingencies. The material words in the above paragraph which defined the measure of those payments are as follows: "In addition thereto payment at the rate of the sum of one dollar per annum for each electrical horse power generated and used and sold or disposed of over ten thousand electrical horse power up to twenty thousand electrical horse power and the further payment of the sum of seventy-five cents for each electrical horse power generated and used and sold or disposed of over twenty thousand electrical horse power up to thirty thousand electrical horse power, and the further payment of the sum of fifty cents for each electrical horse power generated and used and sold or disposed of over thirty thousand electrical horse power."

In the words above cited "horse power" as a term of measurement indicates the rate of generation of electrical energy at a given instant. In dealing with power commercially its duration as well as its force is considered, and sale of horse power means a sale of so many horse power hours or days or years. Contracts for its supply, where payment is based upon actual user, are known as peak contracts and meter contracts. Under the former payment is based upon the greatest number of horse power recorded as taken at any one time, representing the horse power actually used, as measured and shewn by indicating meters, and is computed on each horse power of such record from the date thereof until a subsequent higher record, and so on. Under the latter payment is based either upon the number of "horse power hours" ascertained from meters which compound horse power and time and give the result in horse power hours, or upon the "average horse power" arrived at by averaging the records of horse power from indicating meters.

The figures of the horse power involved in this controversy were not in dispute. Both parties took them from the indicating meters in the respondents' power house, the half-hourly readings of which furnished records in horse power of the horse power generated and used. The issue was as to the method of dealing with those figures. The appellants contended that, on the true construction of the paragraph, payment was to be based thereon according to the practice under what were termed peak contracts, that is, on the greatest number of horse power recorded at any one time until a subsequent higher record. The respondents contended that payment should be calculated according to the practice under meter contracts, that is on average horse power, arrived at by taking the figures of horse power, and then averaging or compounding them with time.

Riddell J.'s judgment was in accordance with the contentions of the respondents and ruled that the additional rental should be calculated on the following basis. " For each day of twenty-four hours the number of H. P. hours generated as measured at the terminals of the generators in the defendants' power house is to be ascertained and from this number is to be deducted the number of H. P. hours used by the defendants for the purposes of their own plant as measured in the said power house and elsewhere where used"; the remainder to form the basis on which the rent should be calculated.

The Court of Appeal was equally divided in opinion, and so the ruling of Riddell J. was affirmed with a variation, from which the respondents did not appeal, to the effect that the power used by the respondents for their own purposes should be included in the power to be paid for by them.

Sir R. Finlay, K.C., MacInnes, K.C., and *Geoffrey Lawrence*, for the appellants, contended that clause 2 of the agreement of July 15, 1899, provides for an additional rental for and from the generation by the respondents of each horse power over 10,000 horse power, and does not provide for the taking of an average of the readings of the meters or for the ascertaining of the number of horse power hours. The agreement deals with the unit of horse power and not with the unit of horse power hour; and if the parties had intended to deal with average horse power they would have done so in express terms. In this case the figures of the horse power involved are not in dispute. Both parties have taken them from indicating meters in the respondents' power house, the half-hourly readings of which furnish records in horse power of the horse power generated and used. The issue is as to the mode of dealing with those figures. It was contended that the clause directed payment to be based thereon according to the practice in contracts known as peak contracts. Payment should be based upon the greatest number of horse power recorded as taken at any one time as actually used. Payment at a stipulated rate is to be computed on each horse power of such record from the date thereof until a subsequent higher record and so on. The last highest record will govern the payment from its date for the remainder of the term. In this way any point of increase in development is to be taken as the starting point for computation thenceforth, and the words "on generation . . . . of 30,000 electrical horse power the gross rental shall be $32,500 per annum payable half-yearly and so on in case of further development" indicate the intention that the rental should not revert at the beginning of each half-year to the minimum of $15,000, but should continue at the figure fixed by the highest previous development until a higher development should be attained. Moreover the appellants' construction is supported by the provisions that payment is to run "from the day" and that half-yearly payments are to be made at certain annual rates "for each horse power generated," not "generated for any period." The expressed controlling idea of this clause is that of development, and it was contended that that pointed to payment being made on the records of "horse power" and not upon the average of half-yearly or other readings of the indicating meters. There is no difficulty about the figures of horse power generated and used. The maximum horse power generated is an actual quantity; average horse power is a hypothetical quantity, being the minimum horse power which will produce a given number of horse power hours in a specified time. The basis of payment contended for by the appellants is the actual horse power demonstrated by the respondents themselves to be required for their obligations to their customers, which obligations could not have been fulfilled by average horse power, or by anything else than the full amount of such actual horse power as the appellants have always delivered the means of producing, which after their contract they could not dispose of elsewhere.

Nesbitt, K.C., and *A. Monro Grier, K.C.*, for the respondents,

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contended that the covenant for additional payment had been rightly construed by Riddell J. in accordance with the contention of the respondents. Those contentions were that the covenant was clear in its terms, namely, that the additional payment was to be calculated on the basis of power "generated and used and sold or disposed of." The word "generated" referred to the actual output of power. The word "used" limited this by eliminating the element of waste. The words "sold or disposed of" further limited this by eliminating power made use of by the company for its own purposes. The result is that the payment is to be ascertained on the basis of what is generated less what is wasted and less what is used by the company itself, or in other words on the commercial output. The rate of payment covenanted for is equally clear. The horse power being generated at any particular time must be measured, less waste and the respondents' user. Then calculate the rental for the time or period in question, ascertained by the average of meter readings, taken by day, hour, or other interval according to reasonable convenience, "at the rate of" one dollar per annum, that is to say, by applying the appropriate fraction thereof. The words of the covenant being clear, its effect was not varied by the illustration or example contained therein, which is governed by the words "as above provided." It was contended that the remaining portion of clause 2 of the agreement supported the respondents' construction of the covenant and were inconsistent with the contention of the appellants. The words of the covenant could not be reasonably construed as requiring that the rental is to depend on the highest point previously reached even for an instant and not upon the actual quantities generated during the half-year in question. Such a construction is inequitable and contrary to the intention of the parties as gathered from the agreement and the surrounding circumstances. The appellants in effect contend that the rental in question depends upon the capacity or state of development of the respondents' power plant. On the other hand the covenant bases the rental not on development nor on capacity, but on output, not on each electrical horse power which the plant had the capacity to generate, but on the total electrical energy actually and in fact generated, or, which comes to the same thing, on the average electrical horse power developed. In order that the appellants' contention should prevail they must shew that the covenant contains express words apt to give effect to such intention, and in this they have failed.

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Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN. The question in this case lies in a narrow compass. But it is one of considerable difficulty. The trial judge, Riddell J., decided the question in favour of the respondents. The four learned judges who constituted the Court of Appeal for Ontario were equally divided in opinion. Moss C.J. and Garrow J. were in favour of affirming the decision of the trial judge. Meredith and Magee JJ. were in favour of reversing that decision. And so the judgment of the trial judge with a slight variation was upheld.

The result is that this Board is now called upon to determine the meaning and effect of one paragraph in an agreement dated July 15, 1899, made between the Commissioners for the Queen Victoria Niagara Falls Park acting therein on their own behalf and with the approval of the Government of the Province of Ontario, who are therein and hereinafter called "the Commissioners," of the first part, and the Canadian Niagara Power Company of the second part. This agreement was made in pursuance of statutory authority. It modified and varied an agreement dated April 7, 1892, made between the Commissioners and the promoters of the then intended company, afterwards incorporated as the Canadian Niagara Power Company. The statute which incorporated the company ratified and confirmed the agreement of April, 1892, and made it binding upon the company.

There is no clause or provision in the agreement of 1892 similar to the paragraph in the agreement of July, 1899, which is now under consideration. But it is convenient, if not necessary, to consider the provisions of the earlier agreement in order to understand the position of the parties when the agreement of 1899 was made.

By the agreement of April 7, 1892, it was (among other things declared :—

(1.) That for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park the Commissioners grant to the company a licence irrevocably to take water from the Niagara river between the head of Cedar Island and the mainland, and to lead the water by means of that natural channel and an extension of it to supply works to be constructed by the company in buildings and power houses on the mainland within the park upon a location therein described which was to occupy a tract of land of not more than 1200 feet in length by not more than 100 feet in width ; and

(2.) That the company was to have the further right to excavate tunnels to discharge the water led from the Niagara river to the said buildings and power houses so that such water should emerge below the Horse Shoe Fall at or near the water's edge.

The licence was subject to three specified agreements which were already in existence and operative.

By paragraph 4 of the agreement it was declared that the licence was granted for the term of twenty years at the rental of $25,000, and that during the second ten years of that term the rental was to be increased by the sum of $1000 each year so that in the twentieth year the rental would be $35,000.

At the end of the period of twenty years the company was to be entitled at their option to a further period of twenty years, and similarly at their option to three further renewals at the like rental. So the effect was in substance that the company became entitled to a licence, or lease as it is sometimes called, for the period of 100 years, terminable at their option at the end of each successive period of twenty years. There was a further provision entitling the company during the first period of twenty years to terminate the licence or lease at any time on giving three months' notice in writing.

There were further powers granted to the company which it is not necessary to specify.

The company undertook to begin the work on or before May 1, 1897, and to proceed so far with their works on or before November 1, 1898, as to have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply, and transmission 10,000 developed horse power by the said last-mentioned day.

By the agreement of July, 1899, the time for the construction of the proposed works was extended, and the terms of payment by the company for the accommodation and facilities placed at their disposal were varied.

Paragraph 2 is expressed in the following words:—"The said agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable is hereby amended by providing that from and after the first day of May, 1899, the rent payable under the said agreement in lieu of that specified in paragraph 4 thereof shall be up to the first day of May, 1949, the sum of fifteen thousand dollars per annum, payable half-yearly on the same days and times as specified in said paragraph 4 of said agreement, and in addition thereto payment at the rate of the sum of one dollar per annum for each electrical horse power generated and used and sold or disposed of over ten thousand electrical horse power up to twenty thousand electrical horse power, and the further payment of the sum of seventy-five cents for each electrical horse power generated and used and sold or disposed of over twenty thousand electrical horse power up to thirty thousand electrical horse power, and the further payment of the sum of fifty cents for each electrical horse power generated and used and sold or disposed of over thirty thousand electrical horse power; that is to say, by way of example, that on generation and use and sale or disposal of thirty thousand electrical horse power the gross rental shall be $32,500 per annum payable half yearly, and so on in case of further development as above provided, and that such rates shall apply to power supplied or used either in Canada or the United States. Such additional rentals as shall be payable for and from such generation and sale or other disposition as aforesaid to the Commissioners shall be payable half-yearly at the rate above specified on the first days of November and May in each year for all power sold in the said several half-yearly periods from the day of sale; and within ten days after said first days of November and May in each year on which such additional rentals shall be payable respectively the treasurer, or if no treasurer the head officer of the company, shall deliver to the Commissioners a verified statement of the electrical horse power generated and used and sold or disposed of during the preceding half-year, and the books of the company shall be open to inspection and examination by the Commissioners or their agent for the purpose of verifying or testing the correctness of such statement; and if any question or dispute arises in respect of such return or of any statement delivered at any time by the company to the Commissioners of the quantity or amount of the electrical horse power generated and used and sold or disposed of or of the amount payable for such additional rentals the High Court of Justice of Ontario shall have jurisdiction to hear and determine the same and to enforce the giving of the information required."

The whole question turns on the meaning and effect of that paragraph.

In lieu of a fixed rental mounting up by annual increments to $35,000 a year, the Commissioners agreed to accept, and the company agreed to pay, a fixed rental of $15,000 a year and an additional rental varying in amount by reference to the electricity generated and used and sold or disposed of by the company.

So far the parties are agreed. The dispute is as to the method of computing this additional rental.

To assist the Court in coming to a right conclusion the parties agreed on admissions as to the methods according to which electricity is disposed of in ordinary commercial practice.

These methods are conveniently summarized in the respondents' case as follows:—

"(1.) A contract whereby the customer has the right to receive continuously a certain amount of power and pays for it on the basis of the amount he is entitled to receive. He has the right to call for it, and he pays for it, whether in fact he calls for it or not, and whether in fact the power is ever generated or not."

This method is known as the flat rate contract.

"(2.) A contract whereby the customer takes what power he

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wants, as and when he wants it, and pays on the basis of the exact number of kilowatt hours, or the horse power hours taken."

That method is known as the meter contract.

"(3.) A contract whereby the customer takes what power he wants as and when he wants it, but pays on the basis of what is called 'the peak,' that is to say, on the basis of the number of watts or of horse power made use of by him at the instant of maximum use."

That method is known as the peak contract.

The flat rate contract may be left out of consideration.

Much argument was expended on the comparative advantages of the meter contract and the peak contract.

It may, however, be doubted (if it is permissible to express a doubt on the subject after the able and elaborate arguments addressed to this Board by the learned counsel on both sides) whether the solution of the question at issue is more advanced or more embarrassed by a discussion as to the merits or the applicability of these two methods of contract.

One thing is plain. This contract is neither a meter contract nor a peak contract, for the simple reason that the Commissioners do not create or produce any vendible commodity.

The part of the Commissioners is to place at the disposal of the company (whether you call the instrument of disposition a licence or a lease) a strip of the park lying by the water's edge just above the Horse Shoe Fall, together with the use of a portion of the flow of the river, as it passes, for the purpose of constructing electrical works and generating there electricity for transmission beyond the limits of the park. They neither generate nor dispose of electricity themselves.

The result is that, when the contract speaks of an additional rental *for* electrical power generated and used and sold or disposed of over and above a certain quantity or amount it cannot mean that the additional payment is "in consideration of" or "remuneration for" the power generated and disposed of. It must mean that the rental is to be calculated by reference to the amount or quantity of power generated and disposed of by the company, that is, that when the amount or quantity generated and disposed

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of by the company is so much the rental to be paid to the Commissioners is to be calculated by reference to it.

The view of the respondents is stated very clearly in their printed case to which Mr. Nesbitt referred. Their Lordships are glad to have had the opportunity of reading in print and considering the argument so presented in addition to listening to the oral address of counsel. "The payment," they say, "is stated to be 'at the rate of the sum of one dollar per annum for each electrical horse power.' The words 'at the rate of' mean that the payment is to be calculated for all periods on the basis of one dollar for a full period of a year. The method of working out the clause is simple. Take each day of the year, or each hour of the year, or each instant, according to reasonable possibility or convenience. Ascertain, that is to say, measure, the horse power being generated at that time, less waste and the respondents' own user. In the case of an instant this is absolute. In the case of an hour or a day a reasonably correct result is obtained by averaging a number of readings, for instance, taken at regular intervals. Find the rental for the period in question, whether it is a day or an hour or an instant, 'at the rate of' one dollar per annum, that is to say, by applying the appropriate fraction of one dollar. These various results, whether of days, hours, or instants, may then be added together, and the total arrived at for the year. Where the power runs above 20,000 horse power a different rate will become applicable to the portion above 20,000, and so with 30,000, but this does not affect the principle, and introduces no inconvenience into the calculation."

Sir Robert Finlay, on the other hand, said that that was an impossible task, or a task so difficult as to be practically impossible. No doubt the method proposed by the respondents is not so simple as that proposed by the appellants; and it seems far more troublesome. But their Lordships are not satisfied that the difficulty is insurmountable or so formidable as to turn the scale in favour of the appellants.

It was contended by the appellants that the true standard was the highest amount or quantity of electricity generated and used and sold or disposed of which the accommodation and facilities furnished by the Commissioners enabled the company to attain and that that point once attained remained the standard until a higher point was reached.

It seems to their Lordships that the two methods are equally fair and equally reasonable. The fairness, of course, depends on the rate adopted. But there is no complaint by either party on that score.

The fact that the rate is lowered as the amount or quantity of electricity developed becomes larger, so that ultimately for additional development the rate is reduced to 50 cents, seems rather to tell against the view presented by the respondents. But that is only a slight indication of the meaning of the parties. The example given by way of illustration points more strongly in the same direction. But after all the example is not conclusive. The question must depend upon the fair meaning of the language used. The case is not susceptible of much argument. It rather lends itself to minute criticism which would be out of place in this judgment.

On the whole, not without some doubt and hesitation, their Lordships have come to the conclusion that the view of the appellants is to be preferred mainly on the ground that there are some expressions which it seems impossible to reconcile with the contention of the respondents, as, for instance, the direction that increased rental is to be payable not simply "*for*"—a word which has already been criticized—but "*from*" the development of higher power.

It was urged on behalf of the respondents that if in consequence of some sudden emergency the demand on their resources should raise the standard abnormally it would be a very serious thing and a very harsh thing, and tie them down to that standard for the whole remainder of the period of a hundred years. There is, no doubt, force in that objection. But the appellants replied: "You can relieve yourselves from the burden of the contract if it is really oppressive at the end of each period of twenty years until you come to the last period, and the omission of a precaution to guard against a contingency which was either overlooked at the time by your inadvertence, or disregarded then as unimportant, is no reason for putting a strained construction on the words of the second edition of a solemn contract. If you want the

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contract reformed you must come to terms with us. And we are quite willing to remove your objection by consenting to treat each yearly or half-yearly period as distinct and self-contained." That seems a reasonable offer, embodying a provision which apparently would obviate the danger apprehended by the respondents, but which their Lordships are unable to find in the contract as it stands.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and a decree made in favour of the appellants.

The costs paid under the order of the High Court must be refunded.

There will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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July 12, 18, 31.

BARNARD-ARGUE-ROTH-STEARNS OIL AND GAS COMPANY, LIMITED, AND OTHERS . DEFENDANTS;

AND

ALEXANDER FARQUHARSON . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Deed of Conveyance—Reservation to the Grantor of Mines, Minerals, and Springs of Oil—Construction—Natural Gas not reserved.

By deed dated January 22, 1867, the appellant Canada Company granted to the respondent's predecessor in title all their right, title, and interest in the land in suit and every part thereof "excepting and reserving to the said company their successors and assigns all mines and quarries of metals and minerals and all springs of oil in or under the said land whether already discovered or not" with liberty to the company to search for, work, win, and carry away the same:—

Held, that according to the true construction of this reservation the right to search and bore for natural gas was not excepted and passed to the grantee. At the date of the deed natural gas had no commercial value and the parties thereto had no intention to except it as being a mine or mineral.

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* *Present:* VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, and SIR CHARLES FITZPATRICK.

Lord Provost and Magistrates of Glasgow v. *Farie* (1888) 13 App. Cas. 657, 675, followed.

APPEAL from a judgment of the Court of Appeal (November 20, 1911) affirming a judgment of the Chancellor of Ontario (November 23, 1910).

The action was brought by the respondent against the appellants, that is, the Canada Company and its licensees or lessees, for damages in respect of their entry upon the lands in suit and operating thereon for oil and natural gas which they won and carried away and were at the date of action still winning and carrying away.

The question decided was as to the true construction of the excepting clause set out in their Lordships' judgment in the Canada Company's conveyance to the respondent's predecessor of the lands in suit dated January 22, 1867, and as to the rights reserved to the appellants thereunder in respect of natural gas.

The trial judge decided that the appellants were entitled under the said clause to search and bore for oil, but that the reservation did not include the right to search and bore for natural gas, and that this latter right belonged to the respondent as the land or surface owner. The appellants appealed as to the natural gas, but the respondent did not cross appeal as to the oil.

With regard to natural gas the trial judge held that it may be classed as a mineral, yet it did not necessarily follow that it was within the said clause. He said the case of *North British Ry. Co.* v. *Budhill Coal Co.* (1) had decided that the determination of the meaning of the words "mines and minerals" is a question of fact, that is to say, one is to find what these words mean in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce. He then found that in that ordinary sense mineral was a hard substance and not fluid or gaseous. He also found that natural gas was not of commercial importance until some years after the date of the deed which contained the reservation, and that it was not in the contemplation of either party as being a mineral and that it passed under the grant of the land to the purchaser.

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(1) [1910] A. C. 116.

In appeal the majority of the Court (Meredith J.A. dissenting) affirmed this decision. Meredith J.A. held that the appeal should be allowed because (*a*) "natural gas" was at the date of the deed and still is an essential part of every "spring of oil" in the Province of Ontario and therefore did not pass to the grantee; (*b*) "natural gas" is included in the words "metals and minerals" used in the reservation; and (*c*) the cases of *North British Ry. Co.* v. *Budhill Coal Co.* (1) and *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (2) did not bear the interpretation put upon them by the other judges of the Court of Appeal, but were in favour of the appellants.

Sir R. Finlay, K.C., Hellmuth, K.C., and *Rowlatt,* for the appellants, contended that the excepting clause included natural gas on its true construction. The Court below did not follow its decision in 1890 in *Ontario Natural Gas Co.* v. *Smart.* (3) It was influenced by recent decisions in the House of Lords. The principle of construction is laid down in *Hext* v. *Gill* (4) as explained by the decision in *Lord Provost and Magistrates of Glasgow* v. *Farie.* (5) Natural gas is not part of the ordinary composition of the soil, but is an exceptional mineral substance found at a depth below the surface and specially valuable to extract. It was therefore a mineral upon the principle of the following cases: *Great Western Ry. Co.* v. *Carpalla United China Clay Co.* (6), *North British Ry. Co.* v. *Budhill Co.* (1), and *Caledonian Ry. Co.* v. *Glenboig Union Fireclay Co.* (2) Natural gas moreover is one of the products of a spring of oil and is included in the reservation of such springs. Its practical working is not severable

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(1) [1910] A. C. 116.

(2) [1911] A. C. 290.

(3) (1890) 19 Ont. Rep. 591; S. C. in appeal (1891) 18 Ont. App. Rep. 626.

(4) (1872) L. R. 7 Ch. 699.

(5) (1888) 13 App. Cas. 657.

(6) [1910] A. C. 83, 86.

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from that of mineral oil. The two products have a common origin and are both known as hydro-carbons, belonging to the petroleum series and known before the date of the deed as carbonaceous minerals.

Danckwerts, K.C., and *MacInnes, K.C.*, for the respondent, contended that the excepting clause should be construed strictly, and could only include what was in esse at the date of the deed. The words of the clause do not reserve natural gas. "Minerals" does not include it in the sense in which the term natural gas was used in the vernacular of the mining world, the commercial world, and landowners at the date of the deed. It was not a thing at that time of commercial value and the parties to the deed could not have had it present to their minds. The Canada Company did not specify natural gas in any of their leases or conveyances prior to 1892 and until then attached no importance to it. Minerals in the clause did not include oil, for oil was specifically mentioned in order that it should be excepted from the grant. It did not therefore include natural gas, which would have been specified if the parties intended that it should be reserved. Reference was made to *Symington* v. *Caledonian Ry. Co.* (1), referring to *Caledonian Ry. Co.* v. *Glenboig Co.* (2); *Great Western Ry. Co.* v. *Blades* (3); *Great Western Ry. Co.* v. *Carpalla Co.* (4); *North British Ry. Co.* v. *Budhill Co.* (5); *Hext* v. *Gill* (6); *Lord Provost and Magistrates of Glasgow* v. *Farie* (7); *In re Todd and North Eastern Ry. Co.* (8); *Church* v. *The Inclosure Commissioners* (9); *Midland Ry. Co.* v. *Robinson* (10); *Attorney-General for the Isle of Man* v. *Mylchreest* (11); *Tucker* v. *Linger* (12); *Dunham* v. *Haggerty* (13); *Silver* v. *Bush.* (14)

Sir R. Finlay, K.C., in reply.

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(1) [1912] A. C. 87.
(2) 1910 S. C. 951; [1911] A. C. 290.
(3) [1901] 2 Ch. 624.
(4) [1910] A. C. 83, 86.
(5) [1910] A. C. 116, 127, 131.
(6) L. R. 7 Ch. 699.
(7) 13 App. Cas. 657.
(8) [1903] 1 K. B. 603.
(9) (1862) 11 C. B. (N.S.) 664, 674.
(10) (1889) 15 App. Cas. 19.
(11) (1879) 4 App. Cas. 294, 309.
(12) (1883) 8 App. Cas. 508, 510.
(13) (1885) 110 Penn. 560.
(14) (1906) 213 Penn. 195.

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Court of Appeal for Ontario, dated November 20, 1911, affirming the judgment of the Chancellor of Ontario and dismissing the appeal of the appellants.

The Canada Company, the principal appellant, the other appellants being merely its licensees, was incorporated by a charter of King George IV., dated August 19, 1826, granted in exercise of the powers vested in His Majesty by a statute of the Imperial Parliament passed in the sixth year of his reign, entitled "An Act to enable His Majesty to grant to a company to be incorporated by charter to be called the Canada Company certain lands in the Province of Upper Canada, and to invest the Company with certain powers and privileges and for other purposes." By patent issued by the Province of Canada dated October 12, 1841, the Crown granted to this company a large tract of land in what now has become the Province of Ontario, comprising, amongst others, lot No. 6 in the eighth concession of the township of Tilbury East in the county of Kent, saving and reserving to the Crown all gold and silver that might be found on the lands granted. By deed dated January 22, 1867, this company granted to one Charles Farquharson the fee simple in the southern half of the lot No. 6 comprising 100 acres more or less.

This deed contained an excepting clause which ran as follows: "Excepting and reserving to the said company their successors and assigns, all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not, with liberty of ingress, egress, and regress to and for the said company, their successors, lessees, licensees, and assigns, in order to search for, work, win, and carry away the same, and for those purposes to make and use all needful roads and other works, doing no other unnecessary damage, and making reasonable compensation for all damage actually occasioned."

The sole question for decision in the present case is what is the true construction of this clause. Does it or does it not except from the grant the natural gas which impregnates certain underlying strata of these lands? The case does not require that their Lordships should lay down a definition of minerals, nor even draw the line between what are and what are not minerals; the only question for decision is, what, having regard to the time at which this instrument was executed, and the facts and circumstances then existing, the parties to this deed intended to express by the language they have used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language? In one sense natural gas is, as rock oil also is, a mineral, in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. It is obvious, however, for several reasons, that in this clause of the grant the word "minerals" is not used in this wide and general sense. First, because two substances are expressly mentioned in the clause which would be certainly covered by the word "minerals" used in its widest sense, namely, "metals," and "springs of oil in or under the said land"; secondly, because the words "all mines and quarries of metals and minerals," coupled with the words "search for, work, win, and carry away the same," do not seem to be applicable to a thing of the nature of this gas, obtainable in the way it is obtained; thirdly, because of the nature of the relation which exists between this gas and rock oil, or "the springs of oil in or under the said land," excepted in the grant and of the function which the gas performs in winning, working, or obtaining the oil from these springs; and fourthly, because of the state of knowledge at the date of this deed and the way in which gas of this kind was then regarded and treated. As Lord Watson said in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1), "the words 'mines' and 'minerals' are not definite terms, they are susceptible of limitation or expansion according to the intention with which they are used." It is clearly established by the evidence that this gas is not volatilized rock oil, nor is rock oil condensed natural gas. The gas is not an exhalation of the oil, nor is it held in solution by the oil to any considerable extent. The gas and the oil are in

(1) 13 App. Cas. 657, 675.

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their chemical composition no doubt both hydro-carbons, but they are distinct and different products, and it therefore could not be contended successfully, their Lordships think, that the words "springs of oil" cover this natural gas, simply because both are found, in some cases, to impregnate the same subterranean porous stratum, and that when this stratum is tapped by a pipe or boring leading to the surface the gas in its escape to the upper air helps to bring up to the surface with it some of the oil. In some instances a stratum almost entirely impregnated with gas is found separated by a stratum impervious to both gas and oil from a stratum almost entirely impregnated with oil. Both the impregnated strata are then tapped by pipes so arranged that the gas performs the same function as in the other case, bringing, or helping to bring, the oil to the surface; but in both cases, when the pressure under which the gas is pent up in the earth is relieved, a pump has to be used to pump up the oil. Again, it was proved at the hearing before the Chancellor, by the Chief Commissioner, that oil mining leases only began to be made by the Canada Company in the year 1863. At the date of this deed, January 22, 1867, the winning of mineral oil through wells was a comparatively new industry. This natural gas, according to the witness Mr. W. H. Dowd, did not become commercially valuable till the year 1880. And, according to the evidence of Mr. Coste and others, the accuracy of which does not appear to have been questioned, though gas might be found without the presence of oil, some gas was always found where oil was found, but the gas was regarded as a dangerous and destructive element to be got rid of as it best could. It did not begin to be utilized till the year 1890, over twenty years after the date of the deed. The inference to be drawn from this evidence appears to their Lordships to be that the idea of preserving the ownership of this product, whose presence was regarded in the year 1867, and for many years after, as a dangerous nuisance, never occurred to the parties to the deed of January 22, 1867.

If, in the attempt to exclude from the grant and preserve to the granting company what was then esteemed a valuable subject of property believed to be in the soil parted with, namely oil, a term was used which in its wide sense would cover this then worthless product, gas, the parties never intended, their Lordships think, to use that term in this wide sense.

It has been strongly insisted upon in argument on behalf of the appellants that it will be impossible for the company to take advantage of this exception, and win and carry away oil from these springs, unless they are held to be entitled to the gas also. The gas is now separated from the oil, where they well up together, by a drip tank, and conducted into some receptacle from which it can, when needed, be drawn, but they contend that this could not be done if the ownership of the two substances was divided. No doubt some inconvenience might be caused. That, however, can hardly affect this question of construction. The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned. But however that may be, their Lordships are on the whole of opinion that on the only question raised for their decision, the construction of the excepting clause in the company's deed of January 22, 1867, the decision appealed from was right and should be affirmed, and this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Freshfields.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

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July 15, 16, 19.

ANGUS CORINTHE AND OTHERS . . . . . PLAINTIFFS;

AND

ECCLESIASTICS OF THE SEMINARY OF ST. SULPICE OF MONTREAL . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canadian Act 3 & 4 Vict. c. 30—Construction—Title to a Seigniory—Claim of Appellants to a Trust in their Favour.

In an action by the appellants for possession of the seigniory in suit or of certain common lands comprised therein, or for a declaration that the respondents' title thereto under grants from the King of France (1717—1735) and under later Canadian statutes was subject to a trust, such that the appellants were entitled to the use of the common lands, free from interference:—

Held, that Canadian Act 3 & 4 Vict. c. 30 placed beyond question the respondents' title to the seigniory, and that neither by aboriginal title, nor by prescription, nor on the footing that they were cestuis que trust, could the appellants establish an independent title to possession or control in the administration.

Quære whether in some different form of proceeding the benefits in the seigniory which s. 2 of the Act shews that the appellants were intended to have can be secured to them by means of a scheme for the administration of a charitable trust or otherwise.

APPEAL from a judgment of the Court of King's Bench (December 29, 1911) affirming a judgment of the Superior Court (March 7, 1910) which dismissed the appellants' action.

The appellants' declaration alleged that they were the duly elected chiefs of the band of Indians residing in and about the village of Oka, in the seigniory of the Lake of Two Mountains, which comprises a tract of land with a frontage of about nine miles on the Ottawa River and extending back about nine miles from the river, and that within the seigniory is a tract of land of about two and a half miles long by two miles deep, which has always been known as the "Common," and has been used by

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* *Present:* VISCOUNT HALDANE L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and SIR CHARLES FITZPATRICK.

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the Indians for the pasturing of cattle, the cutting of firewood, &c. It further alleged that the respondents, claiming ownership of the whole seigniory, had sold and were continuing to sell lots therein to "whites," and had within the six months preceding, directly and through an arrangement with the municipal council, fenced in a large portion of the common, preventing the Indians from enjoying it as theretofore. The appellants accordingly prayed (*a*) that the band of Indians be declared to be the absolute owners of the seigniory; or (*b*) that the band be declared to be the absolute owners of the common lands of the seigniory; or (*c*) that, if the respondents (the seminary) be held to have any title to the seigniory, it be declared to be a title in trust for the benefit of the Indians, and that the respondents be ordered to remove all fences and barriers and to desist from interfering with the Indians in the free use and enjoyment of the common lands.

The respondents denied that the present band of Indians were the representatives of any tribe originally occupying these lands, and alleged that, even if they were, any original rights were lost by discovery, occupation, and possession by the King of France and by the grants made by that Sovereign as absolute proprietor; that if any aboriginal right did exist, it was lost by the Act of Capitulation of Montreal and the Treaty of Paris, and by the confirmation of the respondents' rights by the British Crown and the legislation of the province, particularly the Ordinances 2 Vict. c. 50 and 3 & 4 Vict. c. 30, by the statute 22 Vict. c. 48, and by chapters 41 and 42 of the Revised Statutes of Lower Canada. They further pleaded grants from the French Crown of 1717 and 1733, ratified by the King of France respectively in 1718 and 1735, and a grant from the Seminary of St. Sulpice of Paris to the Seminary of St. Sulpice of Montreal in 1764.

Paragraph 29 of their plea was as follows:—

"Since the original concession the seminary has always consented that the Indians should reside in the seigniory and occupy by precarious title inalienable except in favour of other Indians and revocable at will, the lots of ground defined for each family. It has also consented that the Indians should pasture their animals and cut firewood on the property provided that the Indians should only use such permission until further order and under its absolute control in the places and in the manner that it, the seminary, should indicate. The defendants deny that any trust was attached to their title."

Hutchinson J. dismissed the action with costs. He referred to 3 & 4 Vict. c. 30, and held that whatever rights were reserved to and conferred upon the Indians in occupation of the lands at Lake of Two Mountains under art. 40 of the Capitulation of Montreal were entirely ignored by this statute, except the right to claim from the seminary instruction and spiritual care. And on the question of prescription he found on the evidence that the appellants had not occupied the land as proprietors. His judgment of dismissal was "subject to the right of the said plaintiffs, and the Indians represented by them, to demand and receive from the said defendants instruction and spiritual care, and, consequently, the right to reside on the said seigniory on such lots and places as the defendants may designate, within easy distance of the church, and to erect dwellings thereon, and sheds for their cattle and horses, and also to cut and use wood on the said seigniory for the building, repairing, and heating of their dwellings, and the right to pasture on the said seigniory their horses and cattle, all within such limits as the defendants may fix and determine."

Both parties appealed, the plaintiffs contending that they were entitled to a decree as prayed, the defendants objecting to the above declaration of the plaintiffs' rights and praying that it should have been declared "that the Indians have no rights in the seigniory and that they have no rights against the seminary; that if the seminary have any obligations, those obligations are only to give the Indians who are Roman Catholic or who wish to become Roman Catholic instruction and spiritual care, and to allow those who are Catholic or wish to become Catholic to reside in the seigniory at such place as the seminary may designate."

The Court of King's Bench dismissed both appeals without adjudicating on the definition of the Indians' alleged rights given by Hutchinson J. on the ground that the rights of the Indians

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were not in issue in the case. The passage in his judgment cited above was therefore considered as an obiter dictum, and the cross-appeal unnecessary, and for that reason it was dismissed.

R. C. Smith, K.C., and *Rowlatt*, for the appellants, contended that the judgment dismissing their action ought to be reversed. The Oka band of Indians represented by them were entitled as of right to the use, enjoyment, and occupation of the whole seigniory of the Lake of Two Mountains; or in the alternative the respondents' title, if any is declared, is subject to a trust in favour of the Oka band. It was contended that the grants from the French Crown of 1717 and 1733 to the respondents were not absolute in their terms or effect, but were grants in trust, with the result that the appellants were the beneficial owners. Further, the rights of the respondents were extinguished at the time of the Capitulation of 1760, while the Oka band were entitled to the benefit of the articles thereof and of the proclamation of 1763 under which their right to be maintained in possession of the lands they then occupied was secured to them and confirmed. Moreover their rights were recognized in subsequent instructions to the Governors and were not taken away by the later legislation: see the Ordinances 2 Vict. c. 50, 3 & 4 Vict. c. 30, 22 Vict. c. 48, and Consolidated Statutes of Lower Canada, 1861, chapters 41 and 42. On the contrary it was contended that 3 & 4 Vict. c. 30, s. 2, declared a trust in their favour whereby they were entitled to reside on the lands thereof, to the use and occupation of sufficient lands for their comfortable maintenance, pasturage of their cattle and horses, to cut timber necessary for their houses, fences, and firewood, and to have maintained by the respondents suitable schools of instruction for their children. Hutchinson J. and two of the judges of the Appeal Court were of opinion that the Indians had substantial rights in the seigniory, whether proprietary or usufructuary. This reservation, it was contended, was right so far as it went and should be given effect to if the more extensive claim failed. That claim did not depend solely upon the establishment of a trust in their favour. The evidence shewed that the respondents had not complied with the terms of the Capitulation and therefore that their title was forfeited. The appellants, on the other hand, were shewn to have been in actual occupation and to have fenced and maintained the fences surrounding the common lands, and had accordingly gained a title by prescription. Those rights, had not, it was contended, been taken away by any of the enactments already cited.

Sir R. Finlay, K.C., *Geoffrion, K.C.*, and *Geoffrey Lawrence*, for the respondents, relied mainly on their statutory title as declared in Canadian statute 2 Vict. c. 50, re-enacted by 3 & 4 Vict. c. 30, and now contained in c. 42 of the Consolidated Statutes of Lower Canada, 1861: see also 22 Vict. c. 48, now c. 41 of the said statutes of 1861. The title so declared is an absolute title, and not a title subject to a trust in favour of the Indians. It is unnecessary to examine title anterior to those Acts, but the documents of such title do not support the contention of the appellants and do not evidence the creation of a valid trust capable of being enforced. It was contended that the statutes alone determined the rights of the parties. In face of them the appellants could not establish a claim by descent from aboriginal occupants even if they represented them. The evidence did not establish any forfeiture of the seigniory after the cession of Canada by France, and such forfeiture could not have conferred on the Indians any rights not previously possessed by them or any rights paramount to those created by the statutes. They had not acquired ownership by prescription, their acts exercising rights of ownership having always been disputed. The evidence shewed and the Courts have found that the respondents have always possessed the common lands, not only using them to the fullest extent, but selling them and dealing with them as absolute owners. The Indians made no use of them except for pasturage and firewood at the places and to the extent determined by the respondents. As regards the limited rights to which Hutchinson J. referred no appeal is taken with regard to them and they are not before the Board. The respondents claim to be absolute proprietors, that the Indians have no real rights against them, and that whatever statutory obligations they may be under are enforceable by the Crown, and not by the appellants in this suit.

R. C. Smith, K.C., in reply.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. For upwards of a century a controversy has existed concerning the title to the seigniory of the Lake of Two Mountains. The ecclesiastics of the Seminary of St. Sulpice of Montreal, on the one hand, have claimed it under grants from the King of France, and under statutes passed later on by the Canadian Legislature. Their assertion has been that they hold the seigniory in the full proprietary title, and that the Indians residing within the limits of the seigniory have no individual title to it, nor any right, competent to them as individual beneficiaries, to control the administration of the land. The Indians belonging to the band resident upon the seigniory have, on the other hand, contended that they possessed proprietary rights, or at all events indefeasible rights of occupation, by virtue of either an unextinguished aboriginal title, or occupation sufficient on which to found a prescriptive title, or by virtue of an obligation created by the grants, statutes, and other documents relating to the seigniory.

The appellants brought an action on the footing that they were the duly elected chiefs of a band of Indians residing on the land in question. By their declaration they claimed possession of the seigniory, or at all events of certain common lands comprised in it, or, alternatively, that if the defendant ecclesiastics had a title to the seigniory, such title was subject to a trust for the benefit of the plaintiffs and those whom they represented, such that the latter were entitled to the free use of the common lands free from interference.

Among the important documents in the case are certain grants from the King of France in 1717 and 1718, and in 1733 and 1735. These grants, which were made to predecessors of the respondents, purport to convey to them land forming part of the seigniory, with a full proprietary title, but on the condition that they should alter the situation of a certain mission they had founded among the Indians in the neighbourhood, and build a church and a fort for the security of the latter. The circumstances under which these grants were made, and the events which occasioned them, appear in detail in the judgment of the

Superior Court, and their Lordships do not think it necessary to refer to them in detail.

In 1841 the Legislature of Lower Canada passed an Act with a preamble referring to a controversy about the title of the ecclesiastics of the seminary, not relating, however, to the questions involved in the issues raised here. By s. 1 they were declared to be a corporation. By s. 2 their title to the seigniory was confirmed, and it was enacted that the corporation should hold as fully as their predecessors, but for certain purposes, objects, and intents. These were to be the cure of souls within the parish, the Mission of the Lake of the Two Mountains, for the instruction and spiritual care of the Algonquin and Iroquois Indians, the support of a college at Montreal, the support of schools for children in the parish, and of the poor, invalids and orphans, the support and maintenance of the members of the corporation, its officers and servants, and the support of such other religious, charitable, and educational institutions as may from time to time be approved by the Governor of the province, and for no other objects, purposes, or intents.

By s. 14 the ecclesiastics were to lay accounts before the Governor of the province, and by s. 15 they were, in respect of temporal matters, to be subject to visitation.

Their Lordships think that the effect of this Act is to place beyond question the title of the respondents to the seigniory, and to make it impossible for the appellants to establish an independent title to possession or control in the administration. They agree with the learned judges in the Courts below in thinking that neither by aboriginal title, nor by prescription, nor on the footing that they are cestuis que trust of the corporation, can the appellants assert any title in an action such as that out of which this appeal arises. They agree with the reasoning upon these points in the judgments of the Courts below.

They desire, however, to guard themselves against being supposed to express an opinion that there are no means of securing for the Indians in the seigniory benefits which s. 2 of the Act shews they were intended to have. If this were a case which the practice of the English Courts governed, their Lordships might not improbably think that there was a charitable trust which the Attorney-General, as representing the public, could enforce, if not in terms, at all events cy-près by means of a scheme, or, if necessary, by invoking the assistance of the Legislature. Whether an analogous procedure exists in Quebec, and whether in that sense the matter is one for the Government of the Dominion or of that of the Province, are questions which have not been, and could not have been, discussed in proceedings such as the present. All their Lordships intend to decide is that, in the action in which the present appeal arises, the plaintiffs' claim was based on a supposed individual title which their Lordships hold not to exist. If in some different form of proceeding the Crown, as representing the interest of the public, puts the law in motion, or if negotiations are initiated for the settlement of a question as to the location of these Indians which may be of importance to the general interests of Canada, their Lordships desire to make it clear that nothing they have now decided is intended to prejudice the questions which may then arise.

They will humbly advise His Majesty to dismiss the appeal. They gather from what was said at the Bar that it is unnecessary for them to dispose of the costs.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1912
July 22, 23, 29.

IN THE MATTER OF A REFERENCE TO THE SUPREME COURT OF CANADA OF CERTAIN QUESTIONS CONCERNING MARRIAGE.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, ss. 91 *and* 92—*Construction—Jurisdiction of the Provincial Legislature—Solemnization of Marriage.*

Under ss. 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial Legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract.

Appeal by special leave from opinions given by the Supreme Court of Canada (June 17, 1912) in answer to three questions submitted by the Governor-General in Council under s. 60 of the Supreme Court Act.

The questions and the answers of the Court thereto are set out in the judgment of their Lordships.

The issue with which they dealt was whether the Dominion Parliament had power to set aside any limitation of authority imposed by a province in regard to the performance of a marriage ceremony and to substitute therefor a general authority which should be applicable to all cases, whatever the religious beliefs of the parties to the marriage or of the person authorized to perform the ceremony.

The Government of the Dominion of Canada appointed counsel to argue both sides of the questions submitted; the Attorney-General for the Province of Quebec also appeared before the Supreme Court and the Judicial Committee; and the Attorney-General for the Province of Ontario appeared before the latter tribunal.

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* *Present:* Viscount Haldane L.C., Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Chief Baron Palles.

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Nesbitt, K.C., and *Geoffrey Lawrence* (*Lafleur, K.C.*, with them), in support of the Dominion Parliament's jurisdiction to enact the proposed Bill in whole or in part, and to enact remedial legislation in manner contemplated by the third question, contended that legislation concerning the contract of marriage, its validity and the capacity of the parties thereto, was by s. 91 of the British North America Act exclusively assigned to the Dominion. They further contended that under s. 92 the provincial Legislatures could only deal with the solemnization of marriage, which on its true construction meant the regulation of the evidentiary or religious formalities by which the contract is to be authenticated or sanctified. They referred to s. 91, sub-s. 26, and s. 92, sub-s. 12, and s. 93, and submitted that the word marriage must be construed in its widest sense as meaning the whole contract of marriage independent of formalities which are separable therefrom : see *Dalrymple* v. *Dalrymple.* (1) In that sense solemnization follows on a completed contract declared by the Dominion to be valid, and the jurisdiction assigned to the province was not intended to carry with it the power of impairing or destroying the validity of the contract. The object of the proposed Bill was to prevent the province from doing so. If the Bill were passed the province could still impose formalities and exact penalties from either the parties or the officials or both for failure to comply with them, but it would not be able to make the validity of the marriage dependent on their due performance. The existing Marriage Act (R. S. C., 1906, c. 105) is consistent with this construction, and the proposed Bill to amend it is along the same line. To hold that the Bill was ultra vires of the Dominion would render the power of the Dominion over marriage illusory, contrary to the plain intention of the British North America Act : see *Tennant* v. *Union Bank of Canada.* (2) The Dominion Parliament is the only legislative body which has the power to enact remedial legislation validating marriages solemnized in the different provinces of Canada.

Arnoldi, K.C., for the Province of Ontario, said that he was instructed to read the following memorandum :—" While of opinion that it is difficult to give an unqualified yes or no to any one of

(1) (1811) 2 Hagg. Cons. 54, 61.

(2) [1894] A. C. 31, 45, 47.

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the questions submitted, and that the law is difficult to determine, the Province of Ontario favors a uniform general law for the Dominion, if so framed that the legislative authority of the province in relation to the solemnization of marriage is not thereby violated, and the Province of Ontario adopts so much of the argument of counsel as is consistent with the view above expressed and no more. The Province of Ontario considers that an Act of Parliament which renders valid throughout the Dominion marriages performed in a province by persons legally authorized by such province would result in consolidating and perfecting provincial authority throughout Canada, and in this view the passing of such an Act by the Dominion Parliament would enlarge rather than encroach upon provincial jurisdiction."

Hellmuth, K.C. (*Mignault, K.C.*, with him), contended that the answers given by the majority of the Court to questions 1 and 3 were correct. There is a broad distinction between marriage and the solemnization of marriage. The Dominion has exclusive power to legislate as to the competence of parties to contract marriage, its obligatory force, the status of the parties to it thereafter, its effect upon the status of the children, and the power of dissolving the tie when entered into. The province has exclusive power of regulating the form of the ceremony. The proposed Bill before the Dominion Parliament assumed to deal therewith and was consequently ultra vires. Reference was made to *Citizens Insurance Co. of Canada* v. *Parsons* (1); *Swifte* v. *Attorney-General for Ireland.* (2) By the Civil Code of the Province of Quebec the marriage of Roman Catholics can be validly solemnized only before a Roman Catholic priest. At a mixed marriage also the presence of a Roman Catholic priest is necessary, and the Dominion has no jurisdiction to interfere therewith by a law regulating the mode of celebration. Reference was made to *Beamish* v. *Beamish* (3); *Brook* v. *Brook.* (4)

R. C. Smith, K.C., and *Geoffrion, K.C.*, for the Attorney-General for the Province of Quebec, contended that the proposed Bill was ultra vires of the Dominion. The general subject

(1) (1881) 7 App. Cas. 96.
(2) Ante, p. 276.
(3) (1861) 9 H. L. C. 274, 348.
(4) (1861) 9 H. C. 193, 223.

"marriage and divorce" has been assigned to the Dominion. Out of this subject a small division, "solemnization of marriage in the province," has been carved and assigned to the provinces. Solemnization is therefore expressly excepted from the general words "marriage and divorce" and cannot by any true rule of construction be held to be included therein. It would defeat the purpose of the British North America Act if the Dominion legislative authority should be held in this case to overlap the provincial authority. *Hodge* v. *The Queen* (1) was the first case in which a rule was laid down as to a subject falling within both ss. 91 and 92 and does not apply to the circumstances of this case. Reference was made to the existing legislation on the subject of the solemnization of marriage and its formalities, and it was contended that solemnization in the British North America Act of 1867 must have the same meaning that it had in all previous enactments: see Ordonnance de Blois, Mai, 1579; Édit de Henri IV., Decembre, 1606; Quebec Act 1774 (imperial), 14 Geo. 3, c. 83, s. 8; the Constitutional Act, 31 Geo. 3, c. 31, s. 33 (imperial); and the following Acts of Lower Canada: 44 Geo. 3, c. 2; 1 Geo. 4, c. 19; 7 Geo. 4, c. 2; 23 Vict. c. 11; Consol. Stat., 1861, c. 20, ss. 16, 17, 18; Civil Code of Lower Canada, 1866, arts. 128, 135. Solemnization is not a mere formality, it is an essential part of marriage, and that view of it must have been present to the minds of the framers of the Act of 1867. The Bill is therefore ultra vires the Dominion Parliament: see *Bank of Toronto* v. *Lambe* (2); *City of Fredericton* v. *The Queen* (3); *Citizens Insurance Co.* v. *Parsons* (4); *Attorney-General for Ontario* v. *Hamilton Street Railway* (5); *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (6); *City of Montreal* v. *Montreal Street Railway.* (7)

Nesbitt, K.C., replied, contending that under the true construction of ss. 91 and 92 solemnization in the latter section cannot be so construed as to cut down the jurisdiction of the

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(1) (1883) 9 App. Cas. 117, 130.

(2) (1887) 12 App. Cas. 575, 587.

(3) (1880) 3 Can. S. C. R. 505, 568.

(4) 7 App. Cas. 96, 100, 108.

(5) [1903] A. C. 524.

(6) [1898] A. C. 700.

(7) Ante, p. 333.

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Dominion under s. 91 as to the validity of marriage and the status of the contracting parties.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE L.C. The questions to be decided arise on an appeal, for which special leave was given, from the answers returned by the Supreme Court of Canada to certain questions submitted by the Government of Canada pursuant to s. 60 of the Supreme Court Act.

The questions so submitted were the following:—

1. (*a*) Has the Parliament of Canada authority to enact, in whole or in part, Bill No. 3 of the First Session of the Twelfth Parliament of Canada, intituled "An Act to amend the Marriage Act"?

The Bill provides as follows:—

"(1.) The Marriage Act, Chapter 105 of the Revised Statutes, 1906, is amended by adding thereto the following section:—

"(3.) Every ceremony or form of marriage heretofore or hereafter performed by any person authorised to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony."

"(2.) The rights and duties, as married people of the respective persons married as aforesaid, and of the children of such marriage, shall be absolute and complete, and no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever."

(*b*) If the provisions of the said Bill are not all within the authority of the Parliament of Canada to enact, which, if any, of the provisions are within such authority?

2. Does the law of the Province of Quebec render null and void, unless contracted before a Roman Catholic priest, a marriage that would otherwise be legally binding, which takes place in such Province,

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(*a*) between persons who are both Roman Catholics, or

(*b*) between persons one of whom, only, is a Roman Catholic.

3. If either (*a*) or (*b*) of the last preceding question is answered in the affirmative, or if both of them are answered in the affirmative, has the Parliament of Canada authority to enact that all such marriages, whether

(*a*) heretofore solemnized, or

(*b*) hereafter to be solemnized,

shall be legal and binding?

The answers of the learned judges of the Supreme Court were in substance to the following effect:—

1. As to the first question the Chief Justice, Davies J., Duff J., and Anglin J. were of opinion that the proposed legislation was ultra vires of the Parliament of Canada. Idington J. differed.

2. As to the second question all the learned judges concurred in holding that the law of Quebec does not render null and void unless contracted by a Roman Catholic priest a marriage which takes place in that province between persons one of whom only is a Roman Catholic. As to the validity of such marriages between persons who are both Roman Catholics the Chief Justice asked permission to decline to answer. Sir Louis Davies, Idington, and Duff JJ. were of opinion that they were valid, and Anglin J. held that they were null and void.

3. As to the third question, all the judges except Idington J. were of opinion that the Parliament has no power to enact such remedial legislation.

The decision of these questions turns on the construction to be placed on ss. 91 and 92 of the British North America Act, 1867. Sect. 91 enacts that the Parliament of the Dominion may make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces, and, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, declares that, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of the Dominion extends to all matters coming within the classes of subjects enumerated. One of these is marriage and divorce. The section concludes with a declaration that any matter coming within any of the enumerated classes shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces.

Sect. 92 enacts that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in this section. Among these is the solemnization of marriage in the province. The enumeration also includes, inter alia, property, and civil rights, and generally matters of a merely local or private nature in the province.

In the course of the argument it became apparent that the real controversy between the parties was as to whether all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91. If this is so, then the provincial power extends only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity. This was the view contended for by one set of the learned counsel who argued the case at their Lordships' Bar. The other learned counsel contended that the power conferred by s. 92 to deal with the solemnization of marriagê within a province had cut down the effect of the words in s. 91, and effected a distribution of powers under which the Legislature of the province had the exclusive capacity to determine by whom the marriage ceremony might be performed, and to make the officiation of the proper person a condition of the validity of the marriage.

If the latter view is taken, it is clear how the questions must be answered. For it was agreed between counsel that the Bill referred to in the first question was intended to enable a person with any authority to perform the ceremony to perform it validly whatever the religious faith of those married by him. On the footing indicated the Bill would therefore be ultra vires of the Dominion Parliament. The third question would also be disposed of, for the Parliament of Canada would, in the events indicated in the question, have no authority. The second question consequently becomes not only unimportant, but superfluous.

Notwithstanding the able argument addressed to them, their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92, cover the whole field of validity. They consider that the provision in s. 92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s. 91, and enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract. There have doubtless been periods, as there have been and are countries, where the validity of the marriage depends on the bare contract of the parties without reference to any solemnity. But there are at least as many instances where the contrary doctrine has prevailed. The common law of England and the law of Quebec before confederation are conspicuous examples, which would naturally have been in the minds of those who inserted the words about solemnization into the statute. Prima facie these words appear to their Lordships to import that the whole of what solemnization ordinarily meant in the systems of law of the provinces of Canada at the time of confederation is intended to come within them, including conditions which affect validity. There is no greater difficulty in putting on the language of the statute this construction than there is in putting on it the alternative construction contended for. Both readings of the provision in s. 92 are in the nature of limitations of the effect of the words in s. 91, and there is, in their Lordships' opinion, no reason why what they consider to be the natural construction of the words " solemnization of marriage," having regard to the law existing in Canada when the British North America Act was passed, should not prevail.

This conclusion disposes of the questions raised, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for all parties: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1912
July 31;
August 1;
Oct. 30.

MINNIE ANN McKENZIE AND OTHERS . . . PLAINTIFFS;

AND

CORPORATION OF THE TOWNSHIP OF CHILLIWACK . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Fatal Accident—Action for Damages—Death caused by Fire burning down a Lock-up in which Deceased was confined—No Proof of Negligent Act or Omission.

A small rural township in British Columbia is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, in which there is no fire and matches are not allowed.

APPEAL by special leave from a judgment of the Court of British Columbia (April 5, 1910) affirming a judgment of the Supreme Court (February 22, 1909) which dismissed the appellants' action.

The deceased was burned to death on October 27, 1906, while confined, under the circumstances stated in the judgment of their Lordships, as a prisoner in a lock-up within the respondents' township. It was alleged in the pleadings that this was due to the negligence of the defendant "in not causing some person to be constantly in and about the said building and to be constantly in charge thereof and in charge of the said Daniel McKenzie so that in case of fire or other danger the persons confined in said building might be rescued therefrom."

The respondents denied liability and pleaded that the lock-up was not the property of the municipality and that the police officer in charge thereof was not its servant or agent. They put in no evidence, but moved for judgment as of nonsuit. The jury found that they had been guilty of negligence and awarded damages to each of the appellants. Morrison J., the trial judge,

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* *Present:* VISCOUNT HALDANE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and THE PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (SIR S. T. EVANS).

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dismissed the action on the respondents' motion for judgment. The Court of Appeal affirmed his decision. It considered that it would be unreasonable in a rural district to hold that it was the duty of the corporation to leave a constable or keeper constantly at the lock-up, and that there was no evidence of negligence on the part of the respondents or of the constable.

Joseph Martin, K.C., for the appellants, contended that the verdict of the jury should be upheld to the effect that the death in question was caused by the respondents' negligence. No provision had been made for the safe custody of the deceased. There was no one within call, although the burning of two men must have taken some time. Only one person was employed to take charge of them, and he had a variety of other duties to perform, imposed upon him by the respondents. The respondents detained the man in custody and they were bound to take all precautions to ensure safety to his life. They had cut off all means of escape and were legally responsible for what had happened.

Sir R. Finlay, K.C., *W. B. A. Ritchie, K.C.*, and *Rowlatt*, for the respondents, contended that all reasonable precautions had been taken in view of what was likely to happen, and there was no evidence of negligence for which the respondents were responsible. The negligence charged was not against the constable, but against the respondents for not providing sufficient officers. The respondents were not bound to have a person constantly in charge of the lock-up. Reference was made to Beven on Negligence in Law, 3rd ed., vol. i., p. 326, where there are several American decisions collated, and *Stanbury* v. *Exeter Corporation.* (1)

[They were stopped by their Lordships.]

J. Martin, K.C., replied.

The judgment of their Lordships was delivered by

1912
Oct. 30.

The President of the Probate Division. The appellants brought an action in the Supreme Court of British Columbia, under an Act resembling Lord Campbell's Act, claiming damages for the death of Daniel McKenzie. They were the widow, son, and daughter of the deceased. His death was caused by a fire which burnt down a cell which was used as a "lock-up" for the rural municipality of Chilliwack. The deceased had been placed in this cell by a constable after arrest. The action was brought against the corporation of Chilliwack.

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(1) [1905] 2 K. B. 838, 842.

After much hesitation, the learned judge at the trial left the case to the jury. The verdict of the jury was, "We find that Daniel McKenzie met his death through the negligence of the municipality of Chilliwack. We award the wife $3000, and the children $2000 each."

Subsequently, on motion made for the defendants for a nonsuit, the learned judge dismissed the action without costs. The appeal of the plaintiffs from that decision to the Court of Appeal for British Columbia was dismissed with costs.

The question for decision is whether there was any evidence of negligence on the part of the defendants fit to be left to the jury.

There appears to have been some confusion in the Courts below between two matters, which should be kept quite distinct, namely, (1.) acts of negligence on the part of the defendants' servant in charge of the lock-up, which, if alleged and proved, would involve the question of the liability of the defendants therefor; and (2.) alleged negligence on the part of the defendants themselves.

In their Lordships' opinion, no question of fact, or of law, of the former kind arises at all in this case.

The verdict of the jury affords no indication of what the negligence was which they found.

The statement of claim (paragraph 4) averred the duty of the defendants to have been "to cause some person to be constantly in and about the said building, (i.e., the lock-up), and to be constantly in charge thereof, and of the persons confined therein." The negligence alleged in the statement of claim (paragraphs 5 and 6) was that of the defendants, in not having some person constantly in charge, so that in case of fire or other danger the persons confined in the lock-up might be rescued. It was also pleaded (paragraph 5) that by reason of such alleged negligence the lock-up took fire, and the deceased was burned to death.

Counsel for the plaintiffs who argued at the Bar before their Lordships, and who also conducted the case in the British Columbian Courts, did not contend that the defendants' servant had been guilty of any negligence. His case was that the defendants were directly guilty because they employed the person who arrested the deceased and who was in charge of the cell to perform other duties also which made it impossible for him to be in constant attendance at the lock-up.

Their Lordships are willing to assume for the purposes of this appeal (but without pronouncing any decision on the point) that the respondents are responsible for the appointment of the gaoler for the lock-up, and that if the appointment was not fitly or carefully made, they would be liable for any reasonably probable consequence.

The facts are few and simple.

Chilliwack is a small rural municipality. The "lock-up" which the respondents provided or used was a wooden cell, part of the Court House buildings which were situate about the centre of the little town.

In May, 1906, the respondents appointed one Calbeck to be "chief of police, sanitary inspector, pathmaster, and pound-keeper."

He was the only constable in the municipality. As constable he arrested the deceased man on October 27, 1906, for being drunk and disorderly, and placed him in the cell about 6 o'clock P.M. He searched him and took away the matches found upon him. About an hour later he arrested another man; he also searched him and deprived him of matches and placed him in the same cell.

Shortly after 9 o'clock that evening a fire broke out in or about the cell. Calbeck was then in the town attending to some of his humble but useful duties; but he came on the scene of the fire before the fire company arrived.

Between the time of the arrest of the deceased, about 6 o'clock, and a quarter past 9 o'clock, when he went to the fire, Calbeck appears to have been at the cell four times, and he was able to attend there and to look round within about half an hour of the occurrence of the fire.

The evidence went to shew that the fire originated in the cell in which the arrested men were. There was no stove, or fire, or furnace alight in or near the cell. The statement in the appellants' printed case upon the appeal to their Lordships as to the origin of the fire is as follows: "The fire, which occurred during Calbeck's absence, appears to have originated in the cell in which the prisoners were confined, but apart from the fact that matches could have been handed to one or other of the prisoners through a window by persons passing outside the cell, there is no evidence as to the actual cause of the fire."

If an inference is to be drawn it would not be unreasonable to infer that the place was set on fire by the deceased, or his fellow prisoner, or both.

In any event the plaintiff failed to prove how the fire was caused, or to shew that any one could reasonably expect that a fire might take place.

The principle of law to be applied to these facts is that which was stated by Lord Halsbury L.C. in the leading case of *Wakelin* v. *London and South Western Ry. Co.* (1), as follows: "It is incumbent upon the plaintiff to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; 'Ei qui affirmat non ei qui negat incumbit probatio.'"

In their Lordships' opinion the appellants in this case entirely failed to establish, or to adduce any proof, that the death of the deceased was in any way attributable to, or materially contributed to by, any negligent act or omission on the part of the respondents. Their Lordships concur in the way in which the case was dealt with in the judgment of Macdonald C.J.A.

It was not unreasonable, in their Lordships' view, for the

(1) (1886) 12 App. Cas. 41.

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defendants in the small rural municipality of Chilliwack to allot to Calbeck the other duties to some of which he attended on the evening of the fire; nor was it the duty of the respondents in the circumstances to keep Calbeck or any other person constantly at the lock-up. No breach of duty on their part caused or contributed to the death of deceased.

Upon the facts proved at the trial there was no evidence whatsoever of negligence on the respondents' part fit to be left to the jury.

Their Lordships will therefore humbly advise His Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed with costs to be paid by the appellants.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Gard, Rook & Co.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1912, will be as follows:—

In the First Series,
[1912] 1 Ch. [1912] 2 Ch.

In the Second Series,
[1912] 1 K. B. [1912] 2 K. B. [1912] 3 K. B. [1912] P.

In the Third Series,
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ACQUIESCENCE—Reclamation works on the leased lands—Laws of Natal - 412
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AFFIDAVIT—Discovery—Affidavit of documents—Further affidavit.
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AFFREIGHTMENT—Contract of—Dead freight—Lien—Unseaworthiness—Deviation
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See PRINCIPAL AND AGENT.

APPEAL—Arbitration—Jurisdiction—Consultative opinion of High Court on special case—Award incorporating opinion—Setting aside—Error on face of award
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—— Duty of Court of Appeal—Oral evidence—Weight to be given to opinion of trial judge - - - - - - - 323
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—— House of Lords—Competency—Land purchase—Irish Land Act - - 281
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APPROPRIATION—Mortgage to bank to secure current account—Subsequent mortgage—Notice—Priority—Appropriation of payments - - - - - - 756
See MORTGAGE. 2.

ARBITRATION—*Refusal of Arbitrators to appoint Umpire—Application to Court to appoint—Practice—Parties—Service on Arbitrators—Arbitration Act*, 1889 (52 *&* 53 *Vict.* c. 49), *ss.* 5, 20.

Under the special jurisdiction conferred upon the Court by s. 5 of the Arbitration Act, 1889, to appoint an umpire in references falling within the section, it is competent to the Court, where two arbitrators having liberty to appoint an umpire fail to comply with a notice under that section requiring them to concur in an appointment, to bring the arbitrators before it in order to ascertain their views before making an appointment, due provision being made for their costs.

A dispute having arisen upon a contract for sale, the respective parties, under a submission to arbitration, appointed arbitrators with power to appoint an umpire. The arbitrators having failed to comply with a notice served upon them by the purchasers under s. 5 of the Arbitration Act, 1889, requiring them to appoint an umpire, the purchasers issued an originating summons, to which the arbitrators were made respondents, asking the Court to appoint an umpire. The vendors were not made respondents to the summons as they were not within the jurisdiction. The arbitrator appointed by the vendors objected that he was not a proper party to the summons and that the vendors ought to be made parties thereto. The judge in chambers made an order appointing an umpire, with liberty to the vendors to discharge the order within a given time after receiving notice thereof, the costs to be costs in the arbitration, and his order was affirmed on appeal:—

Held, that the objection as to the form of the summons failed and that the arbitrators were the proper parties to bring before the Court. TAYLOR *v.* DENNY, MOTT & DICKSON, LIMITED - - - - - H. L. (E.) 666

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—— Shipping—Bill of lading—Incorporation of conditions of charterparty—Arbitration clause - - - - - - **1**
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BILL OF LADING — Ship — Lien — Company—Shipment by receiver - - - **254**
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BRIDGE — Road allowances with canals, Authority to intersect—Obligation to build bridges at points of intersection—Appeal from Canada - - - **827**
See Privy Council Appeals. 8.

BRITISH COLUMBIA—Laws of.
See Privy Council Appeals. 9—11.

BRITISH NORTH AMERICA ACT, 1867.
See Privy Council Appeals. 4, 5.

BRUNSWICK (NEW)—Laws of.
See Privy Council Appeals. 12.

BURGH POLICE (SCOTLAND) ACTS, 1892 AND 1903 - - - - - - **520**
See Scottish Law. 2.

CABLE—Taxation of telegraph cables landed in the Colony—Company not carrying on business in or from the Colony—Appeal from Newfoundland - - - **820**
See Privy Council Appeals. 30.

CANADA—Laws of.
See Privy Council Appeals. 3—19.

CASES:—

—— *Alexander Stephen & Sons, Ld.* v. *Allan Line Steamship Co., Ld.*, 1911 S. C. 836
Interlocutor affirmed on the facts
[1912] **A. C. 532**

—— *Anglo-Continental Guano Works* v. *Bell* (1894) 3 Tax Cases, 239.
Distinguished. Farmer *v.* Scottish North American Trust, Limited
[1912] **A. C. 118**

—— *Attorney-General* v *Birmingham, Tame, and Rea District Drainage Board* [1910] 1 Ch. 48.
Varied - - - [1912] **A. C. 788**

—— *Ball* v. *William Hunt & Sons, Ld.* [1911] 1 K. B. 1048.
Reversed - - - [1912] **A. C. 496**

—— *Banknock Coal Co.* v. *Lawrie*, 1911 S. C. 817
Affirmed - - [1912] **A. C. 105**

—— *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259.
Referred to. Lloyd *v.* Grace, Smith & Co. - - - [1912] **A. C. 716**

—— *Blackwood* v. *Reg.* (1882) 8 App. Cas. 82
Followed. Rex *v.* Lovitt
P. C. [1912] **A. C. 212**

—— *Boag* v. *Lochwood Collieries, Ld.*, 1910 S. C. 51.
Overruled. Macdonald or Duris *v.* Wilsons and Clyde Coal Company - - - [1912] **A. C. 513**

—— *British Association of Glass Bottle Manufacturers, Ld.* v. *Nettlefold* [1912] 1 K. B. 369.
Affirmed - - - [1912] **A. C. 709**

—— *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714.
Dicta of Lord Bowen, when Bowen L.J., at p. 718, in, overruled. Lloyd *v.* Grace, Smith & Co. [1912] **A. C. 716**

—— *British Westinghouse Electric and Manufacturing Co., Ld.* v. *Underground Electric Railways Co. of London, Ld.* [1912] 3 K. B. 128.
Reversed - - [1912] **A. C. 673**

—— *Burdick* v. *Garrick* (1870) L. R. 5 Ch. 233.
Approved. Reid - Newfoundland Company *v.* Anglo-American Telegraph Company - [1912] **A. C. 555**

—— *Burland* v. *Earle* - [1902] A. C. 83
Followed. Dominion Cotton Mills Company *v.* Amyot - [1912] **A. C. 546**

—— *Butler* (or *Black*) v. *Fife Coal Co.*, 1909 S. C. 152.
Reversed - - [1912] **A. C. 149**

—— *Cathcart's Trustees* v. *Allardyce* (1899) 2 F. 326.
Overruled. Mackenzie *v.* Johnstone
[1912] **A. C. 743**

CASES—*continued.*

—— *Clayton's Case* - (1816) 1 Mer. 572
The rule in, applied. DEELEY *v.* LLOYDS BANK, LIMITED [1912] **A. C. 756**

—— *Clydebank Engineering, &c., Co.* v. *Don José Castaneda*, [1905] A. C. 6.
Followed. WEBSTER *v.* BOSANQUET [1912] **A. C. 394**

—— *Crawford & Law* v. *Allan Line Steamship Co.*, 1911 S. C. 791.
Reversed - - - [1912] **A. C. 130**

—— *De Beers Consolidated Mines, Ld.* v. *British South Africa Co.* [1910] 2 Ch. 502.
Reversed - - [1912] **A. C. 52**

—— *Deeley* v. *Lloyds Bank, Ld.* [1910] 1 Ch. 648.
Reversed - - - [1912] **A. C. 756**

—— "*Devonshire*," *The*; *The* "*Seacombe*" [1912] P. 21.
Affirmed *sub nom.* OWNERS OF S.S. "DEVONSHIRE" *v.* OWNERS OF BARGE "LESLIE" - . [1912] **A. C. 634**

—— *Dobson* v. *Collis* - (1856) 1 H. & N. 81
Followed. HANAU *v.* EHRLICH [1912] **A. C. 39**

—— *Eccles Corporation* v. *South Lancashire Tramways Co.* [1910] 2 Ch. 263.
Affirmed *sub nom.* SALFORD CORPORATION *v.* ECCLES CORPORATION [1912] **A. C. 465**

—— "*Europa*," *The* - - - [1908] P. 84
Followed and approved. J. & E. KISH *v.* CHARLES TAYLOR, SONS & CO. [1912] **A. C. 604**

—— *Farmer* v. *Scottish North American Trust, Ld.*, 1910 S. C. 966.
Affirmed - - - [1912] **A. C. 118**

—— *General Accident, Fire and Life Assurance Corporation* v. *McGowan* [1908] A. C. 207.
Explained and distinguished. SUN INSURANCE OFFICE *v.* CLARK [1912] **A. C. 443**

—— *Glasgow* (*Lord Provost and Magistrates of*) v. *Farie* (1888) 13 App. Cas. 657, 675.
Followed. BARNARD-ARGUE-ROTH-STEARNS OIL AND GAS COMPANY *v.* FARQUHARSON - [1912] **A. C. 864**

—— *Glasgow and South Western Ry. Co.* v. *Provost, &c., of the Burgh of Ayr*, 1911 S. C. 298.
Affirmed - - - [1912] **A. C. 520**

—— *Griffiths* v. *Eccles Provident, Industrial Co-operative Society, Ld.* [1911] 2 K. B. 275
Affirmed - - [1912] **A. C. 483**

—— *Hamilton & Co.* v. *Mackie & Sons* (1889) 5 Times L. R. 677.
Followed THOMAS & CO. *v.* PORTSEA STEAMSHIP COMPANY - [1912] **A. C. 1**

CASES—*continued.*

—— *Hanau* v. *Ehrlich* - [1911] 2 K. B. 1056.
Affirmed - - - [1912] **A. C. 39**

—— "*Hero*," *The* - - - [1911] P. 128
Affirmed on different grounds *sub nom.* "HERO" (OWNERS OF S.S.) *v.* COMMISSIONERS FOR EXECUTING THE OFFICE OF LORD HIGH ADMIRAL OF THE UNITED KINGDOM - [1912] **A. C. 300**

—— "*Highland Loch*," *The* - [1911] P. 261
Affirmed *sub nom.* KETCH "FRANCES" (OWNERS) *v.* STEAMSHIP "HIGHLAND LOCH" (OWNERS). THE "HIGHLAND LOCH" - - [1912] **A. C. 312**

—— *Hopkinson* v. *Rolt* - (1861) 9 H. L. C. 514
Principle of, applied. DEELEY *v.* LLOYDS BANK, LIMITED [1912] **A. C. 756**

—— *Horst* (*E. Clemens*) *Co.* v. *Biddell Brothers* [1911] 1 K. B. 934
Reversed - - [1912] **A. C. 18**

—— *Kingston-upon-Hull Incorporation for the Poor* v. *Hackney Union* [1911] 1 K. B. 748.
Affirmed - - [1912] **A. C. 475**

—— *Kish* v. *Taylor* - - [1911] 1 K. B. 625
Reversed *sub nom.* J. & E. KISH *v.* CHARLES TAYLOR, SONS & CO. [1912] **A. C. 604**

—— *Lloyd* v. *Grace, Smith & Co.* [1911] 2 K. B. 489.
Reversed - - [1912] **A. C. 716**

—— *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789
The rule of law laid down by Lord Cairns in, applied. WALFORD *v.* WALFORD - - [1912] **A. C. 658**

—— *Lord Advocate* v. *Lord Lovat* (1886) 5 App. Cas. 273, 288.
Followed. KIRBY *v.* COWDEROY [1912] **A. C. 599**

—— *Lord Advocate* v. *Walker Trustees*, 1910 S. C. 1037.
Reversed - - [1912] **A. C. 95**

—— *Mackenzie* v. *Johnstone* - 1911 S. C. 321
Reversed - - [1912] **A. C. 743**

—— *McLean* v. *Fleming* (1871) L. R. 2 H. L. (Sc.) 128.
Referred to. J. & E. KISH *v.* CHARLES TAYLOR, SONS & CO. [1912] **A. C. 604**

—— *Metropolitan Water Board* v. *Colley's Patents, Ld.* [1911] 2 K. B. 38.
Affirmed *sub nom.* COLLEY'S PATENTS, LIMITED *v.* METROPOLITAN WATER BOARD - - - [1912] **A. C. 24**

—— "*Milan*," *The* - - (1861) Lush. 388
Discussed. OWNERS OF S.S. "DEVONSHIRE" *v.* OWNERS OF BARGE "LESLIE" - - [1912] **A. C. 634**

—— *Morgan* v. *William Dixon, Ld.*, 1911 S. C. 403.
Affirmed - - - [1912] **A. C. 74**

CASES—*continued.*

—— *Rex* v. *Dibdin* - - - [1910] P. 57
Affirmed *sub nom.* THOMSON *v.* DIBDIN
[1912] **A. C. 533**

—— *Rose* v. *Hyman* - - [1911] 2 K. B. 234
Reversed *sub nom.* HYMAN *v.* ROSE
[1912] **A. C. 623**

—— *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439.
Dicta of Lord Davey, at p. 465, in, overruled. LLOYD *v.* GRACE, SMITH & CO.
[1912] **A. C. 716**

—— *Russell* v. *Amalgamated Society of Carpenters and Joiners* [1910] 1 K. B. 506.
Affirmed - - [1912] **A. C. 421**

—— "*Seacombe*," *The*; *The* "*Devonshire*" [1912] P. 21.
Affirmed *sub nom.* OWNERS OF S.S. "DEVONSHIRE" *v.* OWNERS OF BARGE "LESLIE" - - [1912] **A. C. 634**

—— *Strang, Steel & Co.* v. *Scott & Co.* (1889) 14 App. Cas. 601.
Explained and distinguished. J. & E. KISH *v.* CHARLES TAYLOR, SONS & CO.
[1912] **A. C. 604**

—— *Symington* v. *Caledonian Ry. Co.* 1911 S. C. 552.
Reversed *Sub nom.* SYMINGTON *v.* CALEDONIAN RAILWAY COMPANY
[1912] **A. C. 87**

—— *Swifte* v. *Attorney-General for Ireland and Swifte* [1910] 2 I. R. 140.
Affirmed - - - [1912] **A. C. 276**

—— *Thomas* v. *Thomas* - (1855) 2 K. & J. 79
Approved. COREA *v.* APPUHAMY
[1912] **A. C. 230**

—— *Thomas & Co.* v. *Portsea Steamship Co.* [1911] P. 54.
Affirmed - - - [1912] **A. C. 1**

—— *Walford, In re. Kenyon* v. *Walford* [1912] 1 Ch. 219.
Affirmed *sub nom.* WALFORD *v.* WALFORD - - - [1912] **A. C. 658**

—— *Warner* v. *Couchman* [1911] 1 K. B. 351
Affirmed - - - [1912] **A. C. 35**

—— *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* [1911] 2 K. B. 162.
Reversed - - [1912] **A. C. 693**

—— *Wedderburn* v. *Atholl* (*Duke of*) [1900] A. C. 403.
Does not apply to Ireland. IRISH SOCIETY *v.* HAROLD [1912] **A. C. 287**

—— *Whinney* v. *Moss Steamship Co.* [1910] 2 K. B. 813.
Affirmed - - [1912] **A. C. 254**

—— "*Xantho*," *The* - (1887) 12 App. Cas. 509
Followed. E. D. SASSOON & CO. *v.* WESTERN ASSURANCE COMPANY
[1912] **A. C. 561**

CEYLON—Laws of.
See PRIVY COUNCIL APPEALS. 20—22.

CHARITY—Charitable bequest—Religious purposes - - - - - - **407**
See PRIVY COUNCIL APPEALS. 1.

—— Seigniory, Title to a—Claim of appellants to a trust in their favour—Appeal from Canada - - - - - **872**
See PRIVY COUNCIL APPEALS. 19.

CHARTERPARTY—Shipping.
See under SHIPPING.

CHINA—Laws of.
See PRIVY COUNCIL APPEALS. 23—25.

CLOG—Mortgage—Clog on equity of redemption—Debentures—Floating charge - **52**
See MORTGAGE. 1.

COAL MINE.
See under MINE.

COLLISION—Shipping.
See under SHIPPING.

COLUMBIA (BRITISH)—Laws of.
See PRIVY COUNCIL APPEALS. 9—11.

COMPANY—*Debenture-holders' Action—Receiver and Manager—Powers—Ship—Bill of Lading—Lien for previously unsatisfied Freight—Shipment by Receiver—Unsatisfied Freight due from Company — Right to exercise Lien against Receiver.*

By an order made in a debenture-holders' action, the plaintiff, A. W., was appointed receiver and manager of the business of Ind, Coope & Co., Limited, a brewery company, and he carried on the business of the company as before. By a letter signed "Ind Coope & Co., Limited, by A. W., receiver and manager," the defendants were instructed to carry to Malta a quantity of beer consigned to the company c/o the company's agents at Malta. The defendants carried the beer to Malta under a bill of lading which named the company as the consignees and provided that the shipowner should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight "due either from shippers or consignees to the shipowner." The defendants for many years had carried beer for the company to Malta under bills of lading in this form, and they claimed a lien on the beer in question for certain unsatisfied freight due to them from the company before the plaintiff's appointment:—

Held (Lord Shaw of Dunfermline and Lord Mersey dissenting), that the defendants were not entitled to a lien for arrears of freight because in truth the plaintiff and not the company was both shipper and consignee, and notice of this fact was conveyed to the defendants by the form of the shipping instructions; and by Lord Atkinson, on the further ground that the plain-

COMPANY—*continued.*
tiff had no power, without the leave of the Court, to create such a lien.

Decision of the Court of Appeal [1901] 2 K. B. 813, affirmed. MOSS STEAMSHIP COMPANY *v.* WHINNEY - - - **H. L. (E.) 254**

—— Debentures—Floating charge—Mortgage—Clog on equity of redemption - **52**
See MORTGAGE. 1.

—— Insurance (Fire) Company—Income tax.
See under REVENUE.

—— Lease by company of all its property intra vires—Power of majority of shareholders to approve lease—Minority bound in the absence of fraud—Appeal from Quebec - - - - **546**
See PRIVY COUNCIL APPEALS. 18.

COMPENSATION—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITION PRECEDENT—Contract for lease—Continuous breach — Liquidated damages - - - - - - **194**
See PRIVY COUNCIL APPEALS. 21.

CONFLICT OF LAWS—*Statute avoiding any Marriage between a Protestant and Roman Catholic celebrated by Roman Catholic Priest —Extra-territorial Operation*—19 *Geo.* 2, *c.* 13 (*Ir.*), *s.* 1.

Sect. 1 of 19 Geo. 2, c. 13 (Ir.), enacting that any future marriage between a Papist and a Protestant or between two Protestants, if celebrated by a Popish priest, should be null and void, was not extra-territorial in its operation and did not, while it was in force, affect a marriage between a domiciled Irish Protestant and a foreign Roman Catholic celebrated by a Roman Catholic priest in a foreign country.

Order of the Court of Appeal in Ireland [1910] 2 I. R. 140, affirmed. SWIFTE *v.* ATTORNEY-GENERAL FOIR RELAND AND SWIFTE **H. L. (I.) 276**

CONTRACT—Canada—Dominion Acts 3 Edw. 7, c. 71, and 4 Edw. 7, c. 24 - - **204**
See PRIVY COUNCIL APPEALS. 3.

—— Damages for breach of contract—Liquidated damages or penalty—Construction - - - - - - **394**
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—— Frauds, Statute of.
See under FRAUDS, STATUTE OF.

—— Sale of goods.
See under SALE OF GOODS.

—— Shipping.
See under SHIPPING.

CONTRACT OF SERVICE—Agreement not to be performed within a year—Agreement of service for definite period exceeding one year—Provision for determination by notice by either side within one year **39**
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CONVEYANCING ACT, 1881—Repairing covenant—Breach—Waste—Relief against forfeiture—Terms of relief—Conversion of chapel into theatre - - **623**
See LANDLORD AND TENANT.

COPARCENER—Ceylon Limitation Ordinance, 1871 — Possession by coparcener presumed to be for joint benefit—Exclusive possession must be proved to be adverse
See PRIVY COUNCIL APPEALS. 22. **230**

COVENANT—Repairing—Breach—Waste—Relief against forfeiture—Terms of relief—Conversion of chapel into theatre **623**
See LANDLORD AND TENANT.

CRIMINAL LAW — *Evidence—Incest—Wife of Person charged—Competent or Compellable Witness—Criminal Evidence Act*, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 4.

Under s. 4 of the Criminal Evidence Act 1898, the wife of a person charged with an offence to which the section applies is not compellable to give evidence against her husband. LEACH *v.* REX - - - **H. L. (E.) 305**

—— Criminal conversation—Action dismissed as incompetent—Res judicata—Laws of Hong Kong - - - - - **400**
See PRIVY COUNCIL APPEALS. 23.

DAMAGES—*Breach of Contract—Sale of Goods —Goods not according to Contract—Measure of Damages — Profit accruing from Act done in mitigation of Damages—Relevancy—Arbitration —Appeal—Jurisdiction — Consultative Opinion of High Court on Special Case—Award incorporating Opinion—Setting aside—Error on Face of Award.*

Although the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, yet, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award.

Turbines supplied under a contract to a railway company were deficient in power and in economy of working and were not in accordance with the contract. The railway company, whilst reserving their right to damages for breach of contract, used the turbines for a time, but ultimately replaced them by other turbines of a different make and design. In the course of an arbitration between the contractors and the railway company as to the measure of damages in respect of the breach of contract the arbitrator found (1.) that the purchase of the substituted turbines by the railway company was a reasonable and prudent course for the purpose of mitigating the damages; (2.) that, even if the original turbines had complied with the contract, it would still have been to the pecuniary advantage of the railway company at their own cost to have replaced them by the other turbines owing to their greater efficiency; and he stated a special case for the opinion of the Court whether in the circumstances the cost of the

DAMAGES—*continued.*

substituted turbines was recoverable by the railway company as part of their damages. The Court answered this question in the affirmative, and the arbitrator made an award expressed to be made on the footing of this answer. A motion to set aside the award as containing an error of law on the face of it was refused, and this refusal was affirmed by the Court of Appeal:—

Held, (1.) that the Court had jurisdiction to set aside the award; (2.) that the pecuniary advantage which the railway company derived from the superiority of the substituted turbines was relevant matter for the consideration of the arbitrator in assessing the damages, and that the award ought to be remitted to him with a declaration to that effect.

Decision of the Court of Appeal [1912] 3 K. B. 128, reversed. BRITISH WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, LIMITED *v.* UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED **H. L. (E.) 673**

—— Contract — Damages for breach of — Liquidated damages or penalty—Construction - - - - - - **394**
See PRIVY COUNCIL APPEALS. 20.

—— Fatal accident — Action for damages — Death caused by fire burning down a lock-up in which deceased was confined —No proof of negligent act or omission —Appeal from Canada- - - **888**
See PRIVY COUNCIL APPEALS. 10.

—— Liquidated damages—Contract for lease—Condition precedent — Continuous breach—Appeal from Ceylon - **194**
See PRIVY COUNCIL APPEALS. 21.

—— Motor car — Negligent driving — Retention of control by the owner — Action for damages — Appeal from New Zealand - - - - - - **844**
See PRIVY COUNCIL APPEALS. 29.

DEBENTURE-HOLDERS—Company.
See under COMPANY.

DEBENTURES—Company.
See under COMPANY.

DEBTS—Succession duty—Locality of simple contract debts—Lex loci and administration—Law of New Brunswick - **212**
See PRIVY COUNCIL APPEALS. 13.

DECEASED WIFE'S SISTER'S MARRIAGE ACT — Repulsion from Holy Communion—Lawful cause - - **533**
See ECCLESIASTICAL LAW.

DECEIT — Action of — Untrue statement to third party—Fraudulent intent must be proved as alleged - - - **186**
See PRIVY COUNCIL APPEALS. 24.

DEMONSTRATIVE LEGACY — Reversionary fund — No time fixed by will for payment—Date from which interest runs - - - - - - - **658**
See WILL.

DEVIATION—Contract of affreightment—Dead freight—Lien—Unseaworthiness - **604**
See SHIPPING. 8.

DIGNITY—Heritable office—Fees of honour—Prescription - - - - - - **95**
See SCOTTISH LAW. 1.

DISCOVERY—*Affidavit of Documents—Further Affidavit — Practice — Rules of the Supreme Court, Order* XXXI., *rr.* 12, 19A.

Although as a general rule an affidavit of documents is conclusive against the party seeking discovery, in the absence of any admission in that or some other document by the party making the affidavit that he has in his possession or power other documents material and relevant to the issue, yet where the affidavit is based upon a misconception of his case by the party making the affidavit, and the Court is practically certain that he has in his possession or power other relevant documents which ought to have been disclosed and which he would have disclosed if he had rightly conceived his case, the Court will order a further and better affidavit.

Decision of the Court of Appeal [1912] 1 K. B. 369, affirmed. BRITISH ASSOCIATION OF GLASS BOTTLE MANUFACTURERS, LIMITED *v.* NETTLEFOLD - - - **H. L. (E.) 709**

DIVIDED PARISHES AND POOR LAW AMENDMENT ACT, 1876 - - **475**
See POOR LAW

DOCUMENTS—Affidavit of—Further affidavit
See DISCOVERY. **709**

DRIFT NETS—Salmon fishing—Nuisance at common law—"Fixed engines" - **287**
See FISHERIES.

ECCLES CORPORATION ACT, 1901 - - **465**
See TRAMWAY.

ECCLESIASTICAL LAW—*Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver — Marriage with Deceased Wife's Sister—Criminal Suit—Monition—Prohibition—* 1 *Edw.* 6, *c.* 1, *s.* 8—*Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, *c.* 47), *s.* 1.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, validates a marriage between a man and his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, and whether before or after the date of the passing of the Act.

The immunity granted by the first proviso to the section to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to the subject-matter of the enacting clause and relates to matters connected with the solemnization of the marriage.

Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within s. 8 of 1 Edw. 6, c. 1, for repelling the parties to the marriage from Holy Communion.

ECCLESIASTICAL LAW—*continued.*

Where, therefore, the Arches Court of Canterbury admonished a clergyman, who, since the passing of the Act, had repelled the parties to such a marriage from Holy Communion by reason of their marriage and cohabitation, to refrain from so repelling them in future :—

Held, that a writ of prohibition ought not to be granted to restrain the Arches Court from proceeding further in the matter of the monition.

Decision of the Court of Appeal [1910] P. 57, affirmed. Thompson *v.* Dibdin **H. L. (E.) 533**

ELECTRIC ENERGY—Laws of Manitoba - **355**
See Privy Council Appeals. 12.

ELECTRIC HORSE POWER — Rental varying with amount of, generated and used and sold—Covenant for rental—Construction—Appeal from Canada - **852**
See Privy Council Appeals. 16.

ELECTRIC WIRES, &c.—Power to erect electric wires and poles in streets—Municipality has no right of veto — Appeal from Canada - - - - - **834**
See Privy Council Appeals. 15.

EMPLOYER AND WORKMAN—*Compensation—Frost-bite—Accident arising out of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A journeyman baker whose right hand had been injured by frost-bite while driving on his rounds in his employer's cart on a cold day in winter claimed compensation under the Workmen's Compensation Act, 1906. The county court judge found as a fact that the man was not specially affected by the severity of the weather by reason of his employment and refused compensation :—

Held that, there being nothing in the evidence to disentitle the county court judge so to find, his finding was not open to review, and that the injury did not result from accident arising out of the employment.

Decision of the Court of Appeal [1911] 1 K. B. 351, affirmed. Warner *v.* Couchman **H. L. (E.) 35**

2. — *Compensation—Incapacity for Work—Disfigurement—Inability to get Work—Workmen's Compensation Act*, 1906 (6 *Edw.* 7), *c.* 58, *s.* 1, *sub-s.* 1 ; *Sched. I.*, *pars.* 1 (*b*), 3.

The provisions of the First Schedule to the Workmen's Compensation Act, 1906, as to the scale and condition of compensation do not cut down the right to compensation conferred by s. 1, sub-s. 1, of the Act.

"Incapacity for work" in paragraph 1 (*b*) of the First Schedule means loss or diminution of wage-earning capacity and includes inability to get work as the result of the injury which the workman has sustained.

A workman lost the sight of his left eye through an accident, but continued to work at his old rate of wages. Many years afterwards he met with a second accident to his left eye which necessitated its removal. On his recovery from the operation he was unable to obtain work in his employment in consequence of his being manifestly a one-eyed man, though his ability to work remained exactly as it was before :—

Held, that he was entitled to compensation.

Decision of the Court of Appeal [1911] 1 K. B. 1048, reversed. Ball *v.* William Hunt & Sons, Limited - - - **H. L. (E.) 496**

3. —— *Compensation—Medical Practitioner—Workman requiring Presence of his own Medical Attendant at Examination—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *clause* 4.

A workman who had given notice of an accident within the meaning of the Workmen's Compensation Act, 1906, refused to submit himself for medical examination by a medical practitioner provided by his employers except upon the condition that his own medical attendant should be present throughout the examination. There were no special circumstances which required the presence of the medical attendant :—

Held, affirming the decision of the Court of Session, 1911 S. C. 403 (Lord Shaw of Dunfermline dissenting), that in the absence of special circumstances the workman was not entitled as of right to have his medical attendant present at the examination.

Held, secondly, that whether a request for the presence of the medical attendant was under the circumstances reasonable is a question of fact to be determined by the arbitrator under the Act.

Per Lord Shaw of Dunfermline, dissenting, that the workman had a right in all ordinary circumstances to require that his medical attendant should be present at the examination, and that the burden was on the employers to shew that this requirement was under the special circumstances so unreasonable as to deprive the workman of the right.

Appeal from an interlocutor of the Second Division of the Court of Session, Scotland, 1911 S. C. 403, affirmed. Morgan *v.* William Dixon, Ld. - - - - **H. L. (Sc.) 74**

4. —— *Compensation—Practice—Competency—Claim by Father of Deceased Employee against Son's Employers—Scottish Law—Sheriff Courts (Scotland) Act*, 1907 (7 *Edw.* 7, *c.* 51), *s.* 30—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss* 13, 14.

In an action in the Sheriff Court, Scotland, the father of a lad, unforisfamiliated, who met his death by accident, sought damages, either at common law, or alternatively under the Employers' Liability Act, 1880, from the defenders, the employers of the deceased. The father alleged that the deceased had contributed all his earnings to his parents for maintenance of the home. The sheriff allowed the case to go to proof. The father then applied that the case should be remitted to the Court of Session for trial by jury by virtue of s. 30 of the Sheriff Courts (Scotland) Act, 1907. The defenders contended that the procedure adopted by the pursuer was incompetent under ss. 13 and 14 of the Workmen's Compensation Act, 1906 :—

Held, affirming the decision of the First Division of the Court of Session, 1911 S. C. 817,

EMPLOYER AND WORKMAN—*continued.*

that the procedure was not incompetent, for although it might be that the effect of ss. 13 and 14 of the Workmen's Compensation Act, 1906, was to bar any appeal to the Court of Session except on a question of law, the right if taken away by the Act of 1906 had been restored by s. 30 of the Sheriff Courts (Scotland) Act, 1907. BANKNOCK COAL COMPANY *v.* LAWRIE **H. L. (Sc.) 105**

5. —— *Compensation — Prohibited Act — Accident arising out of and in Course of Employment—Fatal Accident—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking as he ought to have done, and in the course of the journey his head came in contact with the roof of the mine and he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden and the prohibition was enforced as far as possible. Upon a claim by the father for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the accident arose out of the deceased's employment:—

Held, that there was no evidence to justify this finding, and that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved by his contract of service.

Decision of the Court of Appeal affirmed. BARNES *v.* NUNNERY COLLIERY COMPANY **H. L. (E.) 44**

6. —— *Compensation—Registered Agreement—Termination of Weekly Payment—Suspensory Order—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *par.* 16.

A county court judge has no jurisdiction under the Workmen's Compensation Act, 1906, to terminate an agreement for compensation, but where he is satisfied that the incapacity resulting from the injury has finally disappeared he may finally end the weekly payment provided by the agreement.

The county court judge may also make a suspensory order either by ordering that the weekly payment shall be ended until further order or by reducing the weekly payment to a nominal amount.

Per Lord Atkinson: An agreement whereby the employer agrees to pay the workman a given sum per week as compensation, to continue until the same shall be ended, diminished, increased, or redeemed in pursuance of the Act, and the workman agrees to accept such payment in full discharge of the liability of the employer to pay compensation under the Act, is in accordance with the terms of the Act. TAYLOR *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **H. L. (E.) 242**

7. —— *Compensation — Review — Incapacity for Work—Inability to get Work—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I.*, *pars.* 1 (*b*), 3.

A coal miner, who had sustained an injury by accident, was paid compensation by his employers under a registered agreement on the footing of partial incapacity and was also provided with light work at the picking tables, but he was ultimately dismissed. While so employed, he was certified by a medical referee to be fit for light work such as that on which he was engaged, and there had not since been any change in his physical condition. After his dismissal the miner applied for a review and increase of compensation upon the averment that owing to his condition he was unable to obtain suitable work and that his former employers were unwilling or unable to supply him with the same:—

Held, that the averment disclosed a relevant ground for reviewing the compensation.

Decision of the First Division of the Court of Session reversed.

Boag v. *Lochwood Collieries, Ld.*, 1910 S. C. 51, overruled. MACDONALD or DURIS *v.* WILSONS AND CLYDE COAL COMPANY **H. L. (Sc.) 513**

8. —— *Compensation—Review—Termination—Incapacity resulting from Accident—Concurrent Causes—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1; *Sched. I.*, *pars.* 1 (*b*), 16.

Upon an application by employers for the termination of a weekly payment made by them on the footing of total incapacity to a workman who had lost an eye by accident arising out of and in the course of his employment, the arbiter found that the incapacity had ceased and the workman was fit to resume his former work; that since the accident incipient cataract had appeared in his other eye; and that the cataract was not due to the accident:—

Held, that on these findings the arbiter was right in ending the compensation. HARGREAVE *v.* HAUGHHEAD COAL COMPANY **H. L. (Sc.) 319**

9. —— *Compensation—Seaman on Duty on Watch—Unexplained Disappearance—Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The unexplained disappearance from a ship at sea of a seaman on duty as officer of the watch:—

Held a sufficient ground for inferring that he accidentally fell overboard and met his death by accident arising out of his employment within the meaning of the Workmen's Compensation Act, 1906. OWNERS OF SHIP "SWANSEA VALE" *v.* RICE - - - - - - **H. L. (E.) 238**

10. —— *Negligence — Management of Coal Mine—Statutory Duty—Common Employment—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict.* *c.* 58), *s.* 49—*General Rules* 4 (1.), 7; *Special Rule* 37.

The husband of the pursuer was killed by an outbreak of poisonous gas while working in the employment of the defenders, a limited company, in a coal mine of which they were owners. In an action for damages at common law and

EMPLOYER AND WORKMAN—*continued.*
alternatively under the Employers' Liability Act, 1880, the sheriff-substitute found that the defenders were liable inasmuch as they had failed to appoint officials competent for the working of the mine, and he assessed the damages at 400*l.* On appeal the Court of Session held that the defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualifications and experience; that although there had been a breach of the special rules applicable to the mine under s. 49 of the Coal Mines Regulation Act, 1887, these rules prescribed the duties of the managers and firemen and imposed no duties directly on the owners of the mine; but, secondly, that the defenders were liable under the Employers' Liability Act, 1880, in respect of the negligence of their servants and their failure to comply with the rules in question, and the Court awarded as damages 282*l.*:—

Held, reversing the decision of the Second Division of the Court of Session, that there was a duty on the defenders as owners of the mine to appoint and keep in charge persons competent to deal with the dangers arising in the mine; that they had not discharged this duty, and were therefore liable at common law for the sum awarded by the sheriff-substitute. BUTLER (or BLACK) *v.* FIFE COAL COMPANY
H. L. (Sc.) 149

—— Compensation, Claim to — Non-resident widow of alien workman—Appeal from British Columbia - - - **590**
See PRIVY COUNCIL APPEALS. 9.

—— Negligence—Mine owner—Breach of statutory duty—Coal Mines Regulation Act, 1887 - - - - - - **693**
See MASTER AND SERVANT.

EQUITY OF REDEMPTION—Mortgage.
See under MORTGAGE.

EVIDENCE—Incest—Wife of person charged—Competent or compellable witness **305**
See CRIMINAL LAW.

—— Oral evidence—Weight to be given to opinion of trial judge—Duty of Court of Appeal - - - - - - **323**
See PRIVY COUNCIL APPEALS. 33.

FATAL ACCIDENT—Action for damages—Death caused by fire burning down a lock-up in which deceased was confined—No proof of negligent act or omission—Appeal from Canada - - - **888**
See PRIVY COUNCIL APPEALS. 10.

—— Mine owner—Negligence—Breach of statutory duty—Obligation to provide proper raising and lowering apparatus - **693**
See MASTER AND SERVANT.

FEES—Dignity — Heritable office — Fees of honour—Prescription - - - **95**
See SCOTTISH LAW. 1.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FISHERIES — *Salmon Fishing — Drift Nets — Obstruction to Passage of Fish—Nuisance at Common Law — "Fixed Engines" — Fisheries (Ireland) Acts,* 1850 *and* 1863, 13 *&* 14 *Vict. c.* 88, *s.* 1; 26 *&* 27 *Vict. c.* 114, *s.* 4.

In a tidal channel adjoining Lough Foyle drift nets 15 feet deep and 600 yards long are used for the capture of salmon by night. Cork floats are attached to the top of the net and lead weights to the bottom to keep it vertical in the water. The net is gradually paid out from the stern of a boat and, when fully stretched, one end of it is attached by a rope to the boat to prevent the net from being lost, and the other end is left free in the water. The boat is not moored or anchored and the net is not pulled but moves with the tide. The salmon are caught by striking the net and becoming enmeshed in it. The net is left in the water so long as it remains in good fishing form, usually from fifteen minutes to half an hour, and it is then boarded with the fish. Drift nets in Ireland are licensed, and in many districts by-laws regulating their use have been made, under the Fisheries (Ireland) Acts:—

Held, that the drift nets were not fixed engines within the Fisheries (Ireland) Acts and were not an unlawful obstruction to the free passage of fish at common law.

Wedderburn v. *Duke of Atholl* [1900] A. C. 403, does not apply to Ireland. THE SOCIETY OF THE GOVERNOR AND ASSISTANTS LONDON OF THE NEW PLANTATION IN ULSTER WITHIN THE REALM OF IRELAND *v.* HAROLD
H. L. (I.) 287

FLOATING CHARGE—Debentures—Mortgage—Clog on equity of redemption - **52**
See MORTGAGE. 1.

FORFEITURE—Repairing covenant—Breach—Waste — Relief against forfeiture — Terms of relief—Conversion of chapel into theatre - - - - **623**
See LANDLORD AND TENANT.

FRAUD—Deceit, Action of—Untrue statement to third party — Fraudulent intent must be proved as alleged - - **186**
See PRIVY COUNCIL APPEALS. 24.

—— Principal and agent—Authority—Liability of principal for fraud of agent - **716**
See PRINCIPAL AND AGENT.

FRAUDS, STATUTE OF—*Contract—Memorandum in Writing—Agreement not to be performed within a Year—Agreement of Service for Definite Period exceeding One Year—Provision for Determination by Notice by either Party within One Year—Statute of Frauds,* 1677 (29 *Car.* 2, *c.* 3), *s.* 4.

A contract of service or employment for a definite period exceeding one year, but subject to determination by six months' notice by either party during that period, is an agreement not to be performed within a year within s. 4 of the Statute of Frauds and requires a memorandum thereof to be in writing.

Dobson v. *Collis* (1856) 1 H. & N. 81, followed.

Decision of the Court of Appeal [1911] 2 K. B. 1056, affirmed. HANAU *v.* EHRLICH
H. L. (E.) 39

"FREESTONE"—Minerals—Relevancy - 87
See RAILWAY.

FREIGHT—Shipping.
See SHIPPING.

FROST-BITE—Workmen's compensation - 35
See EMPLOYER AND WORKMAN. 1.

GAS—Deed of conveyance—Reservation to the grantor of mines, minerals, and springs of oil—Natural gas not reserved—Appeal from Canada - - - 864
See PRIVY COUNCIL APPEALS. 14.

HERITABLE OFFICE—Dignity—Fees of honour—Prescription - - - - 95
See SCOTTISH LAW. 1.

HOLY COMMUNION — Repulsion from — Marriage with deceased wife's sister
See ECCLESIASTICAL LAW. 533

HONG KONG—Laws of.
See PRIVY COUNCIL APPEALS. 23.

HONOUR—Dignity—Heritable office—Fees of honour—Prescription - - - 95
See SCOTTISH LAW. 1.

HOUSE OF LORDS — Appeal — Competency — Land purchase—Irish Land Act, 1903
See PRACTICE. 281

INCEST—Evidence—Wife of person charged – Competent or compellable witness 305
See CRIMINAL LAW.

INCOME TAX—Inland Revenue.
See under REVENUE.

INDUSTRIAL AND PROVIDENT SOCIETY — *Member—Nomination—Limitation of Amount, to what Date referable—Industrial and Provident Societies Act*, 1893 (56 *&* 57 *Vict. c.* 39), *s.* 25, *sub-s.* 1.

The Industrial and Provident Societies Act, 1893, s. 25, sub-s. 1, empowers a member of a society registered under that Act to nominate any person to whom his property in the society shall be transferred at his decease "provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling":—

Held (Lord Shaw of Dunfermline dissenting), that the word "then" referred to the date of the nomination and not to the date of the nominator's decease, and that the power of nomination related only to property in the society existing at the time of the nomination.

Held, therefore, that a nomination made by a member in respect of all his property in the society at a time when the amount credited to him in the books of the society did not exceed 100*l.* was good as to the amount then standing to his credit, notwithstanding that the amount so credited to him at his decease exceeded 100*l.*

Decision of the Court of Appeal [1911] 2 K. B. 275, affirmed. ECCLES PROVIDENT INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED *v.* GRIFFITHS H. L. (E.) 483

INJUNCTION — Stream — Pollution — Court of Appeal — Jurisdiction — Discharge of injunction on subsequent facts - 788
See STREAM.

INSURANCE (FIRE)—Fire insurance company—Profits or gains—Premium receipts—Deduction for unexpired risks - 443
See REVENUE. 1.

INSURANCE (MARINE)—Policy—Perils of the sea—Cargo damaged by leak caused by rotten condition of the hulk - 561
See PRIVY COUNCIL APPEALS. 25.

INTEREST — Legacy—Demonstrative legacy—Reversionary fund—No time fixed by will for payment—Date from which interest runs - - - - 658
See WILL.

IRISH LAW—Fishing (Salmon)—Drift nets—Nuisance at common law — "Fixed engines" - - - - - 287
See FISHERIES.

—— House of Lords—Appeal—Competency—Land purchase—Irish Land Act, 1903
See PRACTICE. 281

—— Marriage between a Protestant and a Roman Catholic celebrated by a Roman Catholic priest, Statute avoiding any
See CONFLICT OF LAWS. 276

JURISDICTION—Trade union.
See under TRADE UNION.

LANDLORD AND TENANT—*Repairing Covenant—Breach—Waste—Relief against Forfeiture—Terms of Relief—Conversion of Chapel into Theatre—Structural Alterations—Reinstatement—Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41, *s.* 14, *sub-ss.* 1, 2, 3.

A piece of ground and the chapel then erecting thereon were demised for a term of ninety-nine years less ten days from Christmas, 1842, and the lease contained covenants by the lessees to complete the chapel by a given date and to repair, maintain, and keep the chapel and the walls, fences, and other appurtenances tehreto belonging in good and substantial repair. The chapel was completed and was separated from the adjoining street by some iron railings, but it did not appear when these railings were erected. It was used as a place of religious worship for sixty years. The lease was then sold with the consent of the Charity Commissioners and the premises were adapted for a cinematograph theatre. For this purpose the purchasers removed the iron railings, opened a new door in the west wall of the building, and made various alterations in the interior. The vendor had neglected to comply with a notice to repair and the reversioner was entitled to possession under a proviso for re-entry for breach of covenant, subject to a claim by the purchasers for relief against forfeiture. The purchasers offered, as the conditions of obtaining relief, to deposit a sum of money to secure the restoration

LANDLORD AND TENANT—*continued.*
of the premises to their original condition at the end of the lease, and also to erect and maintain a movable fence of posts and chains in the line of the old fence in order to exclude the public from the premises:—

Held, that, in view of the fact that the lease did not prohibit the contemplated user of the premises, none of the alterations, in the circumstances, constituted either a breach of covenant or waste, and that relief ought to be granted on the terms proposed.

Decision of the Court of Appeal [1911] 2 K. B. 234, reversed. HYMAN *v.* ROSE.
H. L. (E.) 623

—— Contract for lease—Condition precedent—Continuous breach—Liquidated damages
See PRIVY COUNCIL APPEALS. 21. **194**

LAUNCH—Collision—Negligence - - **312**
See SHIPPING. 4.

LEASE—Company—Lease by company of all its property intra vires—Appeal from Quebec - - - - - - **546**
See PRIVY COUNCIL APPEALS. 18.

—— Landlord and tenant.
See under LANDLORD AND TENANT.

LEGACY.
See WILL.

LIEN—Contract of affreightment—Dead freight—Unseaworthiness—Deviation - **604**
See SHIPPING. 8.

—— Ship—Bill of lading—Company—Shipment by receiver - - - - - - **254**
See COMPANY.

LIFERENT—Occupancy or—Testament—Construction - - - - - - **743**
See SCOTTISH LAW. 3.

LOCAL GOVERNMENT—Street—Private street—"Obstruction"—"Road forming part of any railway" - - - - **520**
See SCOTTISH LAW. 2.

LONDON—Water.
See under WATER.

MANITOBA—Laws of.
See PRIVY COUNCIL APPEALS. 12.

MARINE INSURANCE.
See INSURANCE (MARINE). 12.

MARRIAGE—Deceased wife's sister—Repulsion from Holy Communion - - **533**
See ECCLESIASTICAL LAW.

—— Solemnization of marriage—Appeal from Canada—Jurisdiction of the Provincial Legislature - - - - - - **880**
See PRIVY COUNCIL APPEALS. 4.

—— Statute avoiding any marriage between a Protestant and Roman Catholic celebrated by Roman Catholic priest - **276**
See CONFLICT OF LAWS.

MASTER AND SERVANT—*Negligence—Mine Owner—Breach of Statutory Duty—Obligation to provide proper Raising and Lowering Apparatus—Fatal Accident—Coal Mines Regulation Act,* 1887 (50 *&* 51 *Vict. c.* 58), *s.* 16; *s.* 49, *r.* 30.

Sect. 16, sub-s. 1, of the Coal Mines Regulation Act, 1887, provides that the owner of a mine shall not employ any person in the mine or allow any person to be in the mine for the purpose of employment unless, among other conditions respecting shafts, the following condition is complied with: Proper apparatus for raising and lowering persons at each shaft shall be kept on the works belonging to the mine and shall be constantly available for use.

A workman employed in a coal mine, whilst being lowered with twenty-five other workmen in a cage worked by a winding engine, was killed by an accident. Two months before the accident the manager of the mine had directed that the number of men to be lowered in the cage should be increased from twenty to twenty-six and had exhibited this direction on a notice board in accordance with the special rules (made under s. 51 of the Coal Mines Regulation Act, 1887) to be observed at the mine. The widow of the deceased brought an action against the mine owners under the Fatal Accidents Act, 1846, in respect of the death of her husband and founded her claim on the breach by the defendants of their statutory duty under the Coal Mines Regulation Act, 1887, and alternatively on negligence. The jury found that the accident was caused by the combined effect of the inadequacy of the brake attached to the winding engine and the defective condition of a spanner bar used in connection with the reversing gear of the winding engine; that the inadequacy of the brake (which they found was adequate for lowering twenty men) was due to the negligence of the manager in authorizing twenty-six men to be lowered in the cage, and that the defective condition of the spanner bar was due to the negligence of the defendants' mechanical engineer; but that neither was due to the negligence of the defendants. On these findings Pickford J. gave judgment for the plaintiff, on the ground that r. 30 of s. 49 of the Coal Mines Regulation Act, 1887, imposed an unqualified obligation on the defendants to attach to the lowering apparatus a brake adequate for the ordinary working of the mine as prescribed at the time of the accident, but this decision was reversed by the Court of Appeal:—

Held, that s. 16, sub-s. 1, imposed an absolute obligation on the mine owner to provide proper apparatus for lowering persons employed at the mine and that the plaintiff was entitled to judgment on that ground.

Per Viscount Haldane L.C.: He was not to be understood as dissenting from the view of Pickford J. as to the effect of r. 30 of s. 49.

Decision of the Court of Appeal [1911] 2 K. B. 162, reversed. WATKINS *v.* NAVAL COLLIERY COMPANY (1897), LIMITED
H. L. (E.) 693

MEDICAL ATTENDANT—Workmen's compensation - - - - - - - **74**
See EMPLOYER AND WORKMAN. 3.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLITAN WATER BOARD (CHARGES) ACT.
See under WATER.

MINES—Deed of conveyance—Reservation to the grantor of mines, minerals, and springs of oil—Construction—Natural gas not reserved—Appeal from Canada
See PRIVY COUNCIL APPEALS. 14. **864**

—— Minerals—"Freestone"—Relevancy **87**
See RAILWAY.

—— Negligence—Management of coal mines—Statutory duty — Common employment - - - - - - **149**
See EMPLOYER AND WORKMAN. 10.

—— Negligence — Mine owner — Breach of statutory duty—Obligation to provide proper raising and lowering apparatus—Fatal accident - - - - **693**
See MASTER AND SERVANT.

MONITION — Repulsion from Holy Communion—Lawful cause—Marriage with deceased wife's sister - - - **533**
See ECCLESIASTICAL LAW.

MORTGAGE—*Clog on Equity of Redemption—Debentures—Floating Charge.*

By an agreement made between the plaintiff company and the defendant company, after reciting that the plaintiff company contemplated an issue of mortgage debentures, it was agreed that an existing advance made by the defendant company to the plaintiff company under a prior agreement should remain outstanding until the issue of the debentures and that debentures for the amount of the advance should be accepted by the defendant company in satisfaction of the debt; that the debentures should be secured by a floating charge on the plaintiff company's undertaking; that the defendant company should make a further advance of a fixed amount to the plaintiff company against debentures for that amount; and that in consideration of the assistance thus rendered and to be rendered the plaintiff company should grant to the defendant company an exclusive right to work in perpetuity all the diamondiferous ground in the territories of the plaintiff company. The further advance was made and debentures in accordance with the agreement were issued by the plaintiff company to the defendant company for the total amount of the advances. These debentures had since been paid off, but the defendant company insisted upon the grant of the mining licence. The plaintiff company impeached the validity of the stipulation for a licence on the ground that it was a clog on the equity of redemption under the debentures:—

Held, upon the construction of the agreement, reversing the judgment of the Court of Appeal, that it imposed upon the plaintiff company an absolute and immediate obligation to grant a licence but no absolute or immediate obligation to issue debentures; consequently that the stipulation for the licence was not part of the mortgage transaction and was not a clog on the equity of redemption.

Whether the doctrine against clogging the equity of redemption applies to debentures secured by a floating charge, quære.

Order of the Court of Appeal [1910] 2 Ch. 502, reversed. DE BEERS CONSOLIDATED MINES, LIMITED *v.* BRITISH SOUTH AFRICA COMPANY - - - - - **H. L. (E.) 52**

2. —— *Priority—Mortgage to Bank to secure Current Account—Subsequent Mortgage—Notice—Appropriation of Payments—Rule in Clayton's Case.*

G. mortgaged his business premises, first, in 1893, to a bank to secure an overdraft on his current account limited to 2500*l.*, and, secondly, in 1895, to D. to secure 3500*l.*, and the second mortgage was expressed to be subject to the first. Notice of the second mortgage was given to the bank on the date of its execution, but they continued the account as one unbroken account instead of opening a fresh account. G. from time to time made payments into his account which, if applied according to the rule in *Clayton's Case*, would have paid off the moneys due to the bank at the date of the second mortgage by January 8, 1896. The bank had forgotten about the notice, and D. and her husband, who had the management of her business affairs, believed that the mortgage to the bank was a continuing security in priority to D.'s; and the account was dealt with on this footing. The bank never allowed G. to overdraw beyond the secured amount except temporarily on deposit of fresh security. On several occasions D. authorized her husband to deposit her mortgage with the bank to secure G.'s account. In 1896 and 1897 G. frequently made specific appropriations of payments into his account without any alteration being made in the form of the account as shewn by the pass-books. In June, 1899, the bank realized their security for a sum just sufficient to pay the amount due to them and retained the proceeds of sale, and in the same year G. was made bankrupt. D. at that time made no claim to priority, and her husband induced the bank to give up a claim under a collateral guarantee given to them at the time of their mortgage, on the representation that the discharge of the mortgage put an end to the guarantee; and thereupon D. obtained a release of a counter guarantee which she had given to the guarantor.

In April, 1905, D. commenced an action against the bank for the usual accounts as against a mortgagee in possession, and for a declaration that in taking these accounts they were not entitled to charge for advances made to G. after notice of the mortgage to D.:—

Held, that the rule in *Clayton's Case* (1816) 1 Mer. 572, was not excluded by the conduct of the parties, and that, by the conjoint operation of that rule and the principle of *Hopkinson* v. *Rolt* (1861) 9 H. L. C. 514, D.'s mortgage was entitled to priority.

Decision of the Court of Appeal [1910] 1 Ch. 648, reversed. DEELEY *v.* LLOYDS BANK, LIMITED - - - - - **H. L. (E.) 756**

MORTGAGE—*continued.*

—— Mortgages cannot be made irredeemable—Mortgage of a lease of tied house not to be paid off till lease nearly expired—Mortgagor entitled to redeem—Appeal from Western Australia - - 565
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—— Possession of land by mortgagee—Payment of taxes a sufficient act of possession under the circumstances - - 599
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See MASTER AND SERVANT. 693

—— Motor car—Negligent driving—Retention of control by the owner—Action for damages—Appeal from New Zealand
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NEW SOUTH WALES—Laws of.
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NEW ZEALAND—Laws of - - - 844
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"**OBSTRUCTION**"—Road belonging to railway company subject to public right—"Road forming part of any railway" - 520
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See under EVIDENCE.

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See under INSURANCE (MARINE)

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POOR LAW—*Settlement—Irremovability—Residence of Child under Sixteen with deserted Mother—Acquisition of Settlement under Sixteen—Poor Removal Act*, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 3—*Poor Removal Act*, 1848 (11 *&* 12 *Vict. c.* 111), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

A legitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its deserted mother who has become irremovable therefrom.

Decision of the Court of Appeal [1911] 1 K. B. 748, affirmed. HACKNEY UNION GUARDIANS *v.* KINGSTON-UPON-HULL INCORPORATION FOR THE POOR - H. L. (E.) 475

POSSESSION—Possession of land by mortgagee—Payment of taxes a sufficient act of possession under the circumstances—Appeal from British Columbia - 599
See PRIVY COUNCIL APPEALS. 11.

PRACTICE—*House of Lords—Appeal—Competency—Land Purchase—Distribution of Purchase-money—Order of Land Commission—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 24, *sub-s.* 13.

No appeal lies to the House of Lords from an order of the Court of Appeal reviewing a decision of a judicial commissioner with reference to the distribution of the purchase-money on a sale of land under the Irish Land Act, 1903. SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY *v.* BLENNERHASSETT - - - H. L. (I.) 281

PRESCRIPTION — Dignity — Heritable office—Fees of honour - - - - - 95
See SCOTTISH LAW. 1.

PRINCIPAL AND AGENT — *Authority — Liability of Principal for Fraud of Agent.*

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

Barwick v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259, is not an authority for the

PRINCIPAL AND AGENT—*continued.*

proposition that a principal is not liable for the fraud of his agent unless committed for the benefit of the principal.

Dicta of Lord Bowen, when Bowen L.J., in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1887) 18 Q. B. D. 714, at p. 718, and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439, at p. 465, overruled.

A widow, who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell the cottages and to call in the mortgage money, and for that purpose to give him her deeds (for which he gave a receipt in the firm's name); and also to sign two documents, which were neither read over nor explained to her, and which she believed she had to sign in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit:—

Held, that the firm were responsible for the fraud committed by their representative in the course of his employment.

Order of the Court of Appeal [1911] 2 K. B. 489, reversed. LLOYD *v.* GRACE, SMITH & CO. **H. L. (E.) 716**

PRIORITY—Mortgage to bank to secure current account—Subsequent mortgage—Notice—Appropriation of payments - **756**
See MORTGAGE. 2.

1. PRIVY COUNCIL APPEALS — AUSTRALIA *Charitable Bequest—Fund to be expended for the Good of Religion—Religious Purposes—Will—Construction.*

Held, that a residuary bequest "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese" is not a good charitable bequest and is void. The expression used by the testator is not identical with the expression "for religious purposes." DUNNE *v.* BYRNE - - - - - **P. C. 407**

—— New South Wales.
See Nos. 27, 28, below.

2. —— WESTERN AUSTRALIA—*Mortgage—Mortgage cannot be made irredeemable—Mortgage of a Lease of Tied House not to be paid off till Lease nearly expired—Mortgagor entitled to redeem.*

A mortgage cannot be made irredeemable, and equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption.

Where a mortgage of a lease for twenty years provided that without the mortgagee's written consent the mortgage debt should not be wholly paid off till a date within six weeks of the expiration of the lease:—

Held, that the mortgagor was entitled to redeem. FAIRCLOUGH *v.* SWAN BREWERY COMPANY - - - - - **P. C. 565**

3. —— CANADA—*Contract—Construction—Dominion Acts*, 1903 (3 *Edw.* 7, *c.* 71) *and* 1904 (4 *Edw.* 7, *c.* 24).

The Dominion Government by contract with the appellants in 1903 (confirmed by 3 Edw. 7, c. 71) guaranteed to the extent of 75 per cent. of the cost of construction of a certain section of their railway the appellants' first mortgage bonds charged on their whole undertaking; the balance of cost to be raised by second mortgage bonds guaranteed by the Grand Trunk Railway Company.

By a supplemental contract in 1904 (confirmed by 4 Edw. 7, c. 24) the Government agreed to implement their guarantee so as to make the proceeds of the guaranteed bonds which had proved to be deficient equal to the said 75 per cent. of the cost of construction.

The Supreme Court held that under this contract the appellants were bound to issue additional first mortgage bonds to the extent of the deficit and that the Government should guarantee them:—

Held by their Lordships, that the appellants had no power to issue bonds other than those authorized by the original contract, and that it would be a breach of faith with the second mortgagee to do so if they could. The Government were bound to implement their guarantee by cash or its equivalent so as to discharge their liability as defined by the first contract and confirmed by the second, without imposing any further liability on the company. GRAND TRUNK PACIFIC RAILWAY COMPANY *v.* THE KING - - - - - - **P. C. 204**

4. —— *Marriage—Jurisdiction of the Provincial Legislature—Solemnization of Marriage—British North America Act*, 1867, *ss.* 91 *and* 92—*Construction.*

Under ss. 91 and 92 of the British North America Act, 1867, the exclusive power conferred on the provincial Legislature to make laws relating to the solemnization of marriage in the province operates by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion, and enables the provincial Legislature to enact conditions as to solemnization, and in particular as to the right to perform the ceremony, which may affect the validity of the contract. *In re* MARRIAGE LEGISLATION IN CANADA - - - - - **P. C. 880**

5. —— *Practice—Legislation authorizing the putting of Questions to the Courts—Intra vires both of the Dominion and the Provinces—British North America Act*, 1867—*Policy of the Act.*

In 1875, 1891, and 1906 Acts were passed by the Dominion Parliament authorizing the Executive Government of the Dominion to obtain by direct request answers from the Supreme Court of Canada on questions both of law and fact; and nearly all the provinces have passed Acts

PRIVY COUNCIL APPEALS—*continued.*
in similar terms requiring their own Courts to answer questions put by the provincial Governments:—

Held, that it was intra vires of the respective Legislatures to impose this duty on the Courts. Though powers to that effect were not granted in express terms by the British North America Act, 1867, they were not repugnant thereto, but incidental to the complete self-government of Canada which was contemplated by that Act. The answers are only advisory, and by giving them it cannot be said that a Court ceases to be such a judiciary as the Act provides for. ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA - - - **P. C. 571**

6. —— *Railway Commissioners—Jurisdiction of Board of—Provincial Railways—Railway Act of Canada* (1906), (*R. S. C., c.* 37), *s.* 8, *sub-s.* (*b*), *ultra vires.*

Held, that s. 8, sub-s. (*b*), of the Railway Act of Canada (1906, R. S. C., c. 37), which subjects any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is ultra vires of the Dominion Parliament.

An Order dated May 4, 1909, of the Board of Railway Commissioners for Canada (created by Dominion Railway Act 3 Edw. 7, c. 58, and beyond the jurisdiction and control of any province) directed with regard to through traffic over the Federal Park Railway and the Provincial street railway, both within and near the city of Montreal, that the latter should "enter into any agreement or agreements that may be necessary to enable" the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal line:—

Held, that the said Order so far as it related to the provincial street railway was made without jurisdiction. CITY OF MONTREAL *v.* MONTREAL STREET RAILWAY - **P. C. 333**

7. —— *Railway Commissioners — Power of Board of Railway Commissioners—Construction —Condition as to Compensation ultra vires—Order approving Location of Railway rescinded —Dominion Railway Act*, 1906, *ss.* 47, 159, 237 (3.).

Under s. 159 of the Railway Act of 1906 the Board of Railway Commissioners ordered that the location of the appellants' line of railway along certain streets in the city of Fort William be approved in accordance with an agreement between the appellants and the municipal corporation, but subject to the condition that the appellants shall "make full compensation to all persons interested for all damage sustained by reason" thereof:—

Held, that the order must be rescinded. Under s. 237 (3.) the power to award damages was in respect of construction, and s. 47 did not on its true construction extend that power to meet the case of location; and as the condition failed there was no approval. GRAND TRUNK PACIFIC RAILWAY COMPANY *v.* FORT WILLIAM LAND INVESTMENT COMPANY - **P. C. 224**

8. —— *Road Allowances—Dominion Lands Act* (*R. S. C.*, 1886, *c.* 54) — *North-West Irrigation Act*, 1898 — *Authority to intersect Road Allowances with Canals—Obligation to build Bridges at Points of Intersection.*

Under the Dominion Lands Act (R. S. C., 1886, c. 54) strips of Crown lands called road allowances were reserved from public sale and settlement, for the purpose of making roads when and as required.

Under the North-West Irrigation Act, 1898, the respondent irrigation company obtained authority to cross the road allowances met with in their route:—

Held, that the company when it exercised its authority was bound to build at its own cost the necessary bridges at the points where their canals intersected the road allowances and rendered them impassable. Sect. 37 of the Irrigation Act has no application to road allowances; it deals only with "public highways theretofore publicly travelled as such." THE KING *v.* ALBERTA RAILWAY AND IRRIGATION COMPANY - - - - - - **P. C. 827**

9. —— **CANADA — BRITISH COLUMBIA**—*British Columbia Workmen's Compensation Act*, 1902 — *English Workmen's Compensation Act*, 1897— *Construction — Claim to Compensation — Non-resident Widow of Alien Workman.*

Held, reversing the judgment of the Court below, that under the British Columbia Workmen's Compensation Act, 1902 (which is practically identical with the Workmen's Compensation Act of 1897 of the United Kingdom), the widow of an alien workman who lost his life by an accident in the course of his employment by the respondents was entitled to compensation as a dependant of the deceased, notwithstanding that she was residing in a foreign country at the dates both of the accident and the death; and that the appellant as the legal personal representative of the deceased was entitled to payment thereof in trust for her. MIKE KRZUS *v.* CROW'S NEST PASS COAL COMPANY - - **P. C. 590**

10. —— **CANADA—BRITISH COLUMBIA**—*Fatal Accident—Action for Damages—Death caused by Fire burning down a Lock-up in which Deceased was confined—No Proof of Negligent Act or Omission.*

A small rural township in British Columbia is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners in which there is no fire and matches are not allowed. MCKENZIE *v.* CHILLIWACK CORPORATION **P. C. 888**

11. —— **CANADA—BRITISH COLUMBIA**—*Possession of Land by Mortgagee—Payment of Taxes a sufficient Act of Possession under the Circumstances.*

Possession of land must be considered in every case with reference to its peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might

PRIVY COUNCIL APPEALS—*continued.*

reasonably be expected to follow with due regard to his own interest.

The Lord Advocate v. *Lord Lovat* (1886) 5 App. Cas. 273, 288, followed.

Quære as to the effect of a statutory provision that conveyances shall be construed to include the possession of the grantor.

Under a deed of conveyance, intended to be security only, dated July 1, 1889, of wild land in British Columbia without value, the appellant for over twenty years before the respondent's suit for redemption performed the only act of possession of which it appeared to be capable, namely, he paid with the respondent's acquiescence all the taxation upon it, and the respondent made no payment of either principal or interest and had repudiated all connection with the property:—

Held, that the suit to redeem was barred by R. S. B. C., 1897, c. 123, s. 40. KIRBY *v.* COWDEROY - - - - - **P. C. 599**

12. —— CANADA—MANITOBA—*Statutory and Delegated Powers of Appellant Corporation — Construction — Restriction upon importing Electric Energy within the Municipal Limits not expressed, could not be implied—Pole and Wire System not unauthorized — Construction of By-law.*

In a suit by the respondent city corporation against the appellants, who were the successors by amalgamation or purchase of four electric companies, all of whose powers and privileges admittedly vested in them, in effect to restrain them from importing into the city electrical energy produced outside its limits, and for the removal of poles and wires erected and used by them within those limits for the transmission thereof:—

Held, (1.) that as the various Acts and agreements under which the companies were constituted did not expressly forbid or restrict the importation complained of or the erection of poles and wires to transmit the imported energy, such prohibition or restriction could not be implied; (2.) that a restriction contained in a by-law scheduled to the incorporating Act of one of the four companies to the effect that such power houses as were required should be kept within the city and be liable to city taxation had been duly observed, did not cut down the wider powers vested in the other companies and therefore in the appellants, and could not on its true construction be extended so as to prohibit the importation of power or to compel its manufacture within the municipal limits. WINNIPEG ELECTRIC RAILWAY COMPANY *v.* CITY OF WINNIPEG **P. C. 355**

13. —— CANADA—NEW BRUNSWICK— —*Revenue—Succession Duty—Locality of Simple Contract Debts—Lex loci and Administration — Lex domicilii and Distribution—New Brunswick Succession Duty Act*, 1896, *s.* 1 (5.)—*Construction.*

By New Brunswick Succession Duty Act, 1896, s. 1 (5.), all property situate within the province is liable to succession duty whether the deceased was domiciled there or not; such duty being assimilated by other provisions of the same Act to a probate duty payable for local administration.

The testator, resident and domiciled in the Province of Nova Scotia, at the date of his death was possessed of $90,351 deposited in the New Brunswick branch of the Bank of British North America, the head office of which is in London; and the amount was paid to his executors after they had obtained ancillary probate in New Brunswick:—

Held, reversing the judgment of the Supreme Court, that the executors were liable to pay succession duty.

The property consisted of simple contract debts, the obligation to pay being primarily confined to the New Brunswick branch of the bank, and these debts for the purpose of legal representation, of collection, and of administration as distinguished from distribution are governed by the law of New Brunswick, where they were locally situated.

Blackwood v. *Reg.* (1882) 8 App. Cas. 82, followed. THE KING *v.* LOVITT - **P. C. 212**

14. —— CANADA — ONTARIO — *Deed of Conveyance — Reservation to the Grantor of Mines, Minerals, and Springs of Oil—Construction—Natural Gas not reserved.*

By deed dated January 22, 1867, the appellant Canada Company granted to the respondent's predecessor in title all their right, title, and interest in the land in suit and every part thereof "excepting and reserving to the said company their successors and assigns all mines and quarries of metals and minerals and all springs of oil in or under the said land whether already discovered or not" with liberty to the company to search for, work, win, and carry away the same:—

Held, that according to the true construction of this reservation the right to search and bore for natural gas was not excepted and passed to the grantee. At the date of the deed natural gas had no commercial value and the parties thereto had no intention to except it as being a mine or mineral.

Lord Provost and Magistrates of Glasgow v. *Farie* (1888) 13 App. Cas. 657, 675, followed. BARNARD-ARGUE-ROTH-STEARNS OIL AND GAS COMPANY *v.* FARQUHARSON - - **P.C. 864**

15. —— CANADA — ONTARIO — *Electric Wires and Poles in Streets, Power to erect—Municipality has no Right of Veto—Appellants' Incorporating Act*, 2 *Edw.* 7, *c.* 107, *ss.* 12, 13, 21—*Railway Act of* 1888, *s.* 90—*Railway Act of* 1906, *s.* 247—*Construction.*

Held, that by ss. 12 and 13 of their incorporating Dominion Act, 2 Edw. 7, c. 107, the appellants were empowered to enter upon the streets of the town of North Toronto without the consent of its municipal council for the purpose of erecting poles to carry power lines for the conveyance of electricity.

Held, further, that s. 90 of the Railway Act of 1888 as amended by the Railway Act of 1899 and by s. 247 of the Railway Act of 1906, the effect of which would be to give the respondents a veto upon the appellants' exercise of their

PRIVY COUNCIL APPEALS—*continued.*

powers, is inconsistent with the said ss. 12 and 13 of the special Act, and consequently by s. 21 thereof are rendered inapplicable to the appellants. Sect. 247, moreover, applies only to companies within the definition clause of the Act of 1906, that is, to railway companies; while ss. 3 and 4 thereof save the appellants' powers under their special Act. TORONTO AND NIAGARA POWER COMPANY *v.* NORTH TORONTO CORPORATION - - - - - **P. C. 834**

16. —— CANADA — ONTARIO — *Rentals—Covenant for Rental—Construction — Transfer of Land and Water for generating Electricity — Rental varying with Amount of Electrical Horse Power generated and used and sold.*

By agreement in 1899, supplemental to an agreement in 1892, the respondent company agreed to pay a specified fixed rental for a strip of land lying by the water's edge in a public park, together with the use of a portion of the flow of the river as it passes, which had been placed at their disposal for the purpose of constructing works and generating electricity; and also additional rentals varying in amount by reference to the electrical horse power generated and used and sold or disposed of by the company, "such additional rentals as shall be payable for and from such generation and sale or other disposition" to be paid half-yearly:—

Held, that the basis of calculation, according to the true construction of the clause relating to additional rentals, was the highest amount or quantity of electrical horse power generated and used and sold or disposed of at any one time, and so remained until a higher point was reached. ATTORNEY-GENERAL FOR ONTARIO *v.* CANADIAN NIAGARA POWER COMPANY - **P. C. 852**

17. —— CANADA ONTARIO.—*Trust Fund for the Redemption of Bonds offered at the Lowest Price—Construction—Lowest Price means Lowest Average Price at which the whole Fund can be applied.*

A mortgage deed executed by a company in favour of the appellants as trustees for its bondholders provided for an annual fund out of surplus profits to be devoted by the trustees to the purchase or retirement of its bonds, and directed that from the bonds offered to them the appellant company "shall purchase those bonds which are offered to it at the lowest price":—

Held, that according to the plain intent of this direction "the lowest price" offered meant the price which was lowest on the average as applied to the whole block purchased. There was no breach of contract with the respondent in refusing his offer for a small number of bonds if by its acceptance the average price of the whole block acquired would, having regard to the terms of other offers, have been increased. NATIONAL TRUST COMPANY, LIMITED *v.* WHICHER **P.C. 377**

18. —— CANADA—QUEBEC — *Company—Lease—Lease by Company of all its Property intra vires—Power of Majority of Shareholders to approve Lease—Minority bound in the Absence of Fraud—Dominion Statute* 63 *&* 64 *Vict. c.* 98, *s.* 1 (*a*)—*Construction.*

In an action by two shareholders in a cotton company to set aside a lease of the company's mills, and also a resolution of the company in general meeting approving of the same:—

Held, that it was incumbent upon the plaintiffs to shew that the majority of the shareholders either acted ultra vires or so abused their powers as to deprive the minority of their rights.

Burland v. *Earle* [1902] A. C. 83, followed.

Held, also, that (1.) the lease was within the letter of Dominion Statute 63 & 64 Vict. c. 98, s. 1 (*a*), which expressly authorized the cotton company to dispose of its mills; (2.) the evidence shewed that the terms of the lease were fair in fact and in intention to the shareholders. DOMINION COTTON MILLS COMPANY *v.* AMYOT - **P. C. 546**

19. —— CANADA—QUEBEC — *Seigniory — Title to a Seigniory—Claim of Appellants to a Trust in their Favour—Canadian Act*, 1840 (3 *&* 4 *Vict. c.* 30)—*Construction.*

In an action by the appellants for possession of the seigniory in suit or of certain common lands comprised therein, or for a declaration that the respondents' title thereto under grants from the King of France (1717—1735) and under later Canadian statutes was subject to a trust, such that the appellants were entitled to the use of the common lands free from interference:—

Held, that Canadian Act, 1840 (3 & 4 Vict. c. 30), placed beyond question the respondents' title to the seigniory, and that neither by aboriginal title, nor by prescription, nor on the footing that they were cestuis que trust, could the appellants establish an independent title to possession or control in the administration.

Quære whether in some different form of proceeding the benefits in the seigniory which s. 2 of the Act shews that the appellants were intended to have can be secured to them by means of a scheme for the administration of a charitable trust or otherwise. CORINTHE *v.* ECCLESIASTICS OF THE SEMINARY OF ST. SULPICE OF MONTREAL - - - **P. C. 872**

20. —— CEYLON—*Damages for Breach of Contract — Liquidated Damages or Penalty — Construction.*

Where a contract provides that on breach thereof a specified amount should be paid "as liquidated damages and not as a penalty" its true construction must have regard to the particular circumstances of the case and not be such as to render it unconscionable and extravagant. Where it is impossible at the date of contract to foresee the extent of uncertain injury which might be sustained by its breach, or the cost and difficulty of proving it, and the amount is reasonable, it should be recovered as liquidated damages.

Clydebank Engineering, &c., Co. v. *Don José Castaneda* [1905] A. C. 6, followed. WEBSTER *v.* BOSANQUET - - - - - - **P. C. 394**

21. —— *Landlord and Tenant— Contract for Lease—Condition Precedent—Continuous Breach —Liquidated Damages — Condition that Lessee*

PRIVY COUNCIL APPEALS—*continued.*

should not assign without Lessor's Consent not to be implied—C. C. P., ss. 5 *and* 404.

In a contract for a lease it was a condition precedent that the intending lessors should complete by a fixed date certain specified works and render the house to be leased fit for habitation; the sum of Rs.150 to be paid in respect of every day thereafter that the works remained uncompleted:—

Held, in an action for damages, that the omission to complete the works was a continuous breach of contract after the fixed date, and that the stipulated daily sum was not a penalty, but was recoverable down to the date of action as liquidated damages. Also that, as the contract had been in effect abandoned, further damages down to the date of judgment were on the evidence rightly assessed as within the contemplation of both parties.

The contract did not expressly provide that the lessee should covenant not to assign without the lessors' consent, but did stipulate that the intending lessors should not withhold their consent except for exceptionally strong and good reasons:—

Held, that the intending lessee was not bound by implication to covenant as suggested, and that the co-plaintiff who had been added as derivative assignee of the contract and of the action was entitled to maintain the suit jointly with the said lessee.

The rulings of the Supreme Court—(1.) that under C. C. P., s. 5, the breach which arose within the jurisdiction was the whole cause of action; (2.) that an assignment of the right of action after litis contestatio was permissible under s. 404—were approved. De Soysa *v.* De Pless Pol - - - - **P. C. 194**

22. — *Possession by Coparcener presumed to be for the Joint Benefit—Exclusive Possession must be proved to be adverse—Law of Ceylon—Limitation Ordinance*, 1871, *s.* 3.

Before 3 & 4 Will. 4, c. 27, s. 12, it was the rule of English law that possession by one coparcener was possession by the others. Such is now the law of Ceylon, which by its Limitation Ordinance, 1871, s. 3, further provides that the possession relied on by a defendant must be a title adverse to or independent of that of the plaintiff.

Where one of four coparceners by descent entered on possession of the property in suit in 1878 and settled the same on his son in 1907:—

Held, in a suit for partition by the assignee of the other coparceners, that the defendant's possession, unless there was clear evidence to the contrary, must be referred to the title by descent and enured for the benefit of his co-heirs.

Thomas v. *Thomas* (1855) 2 K. & J. 79, approved. Corea *v.* Appuhamy - **P. C. 230**

23. —— **CHINA—HONG KONG**—*Hong Kong Ordinance No.* 20 *of* 1908—*Construction—Res Judicata — Criminal Conversation—Action dismissed as incompetent before the Ordinance—Enactment of a Right of Action did not annul subsisting Judgment.*

Hong Kong Ordinance 20 of 1908 by its retroactive effect gave a right of action for criminal conversation committed prior to its enactment:—

Held, that without explicit words to that effect it did not avail the respondent, whose cause of action was barred as res judicata by a final judgment prior to the Ordinance and founded on the then existing law. Lemm *v.* Mitchell - - - - - **P. C. 400**

24. —— **CHINA — SHANGHAI** — *Deceit, Action of—Untrue Statement to Third Party—Fraudulent Intent must be proved as alleged.*

In an action of deceit the plaintiff must prove that the untrue statement made by the defendant was made with a fraudulent intent.

Where the verdict completely absolved the defendant from the fraud attributed to him, that is, making an untrue statement to a broker in order to depress for his own advantage shares in a company of which he was a director:—

Held, that the Court below was right in refusing a new trial on the ground of misdirection, as it appeared that the trial judge had properly instructed the jury on the material issue of fraudulent intent. Tackey *v.* McBain **P. C. 186**

25. —— **CHINA — SHANGHAI** — *Insurance (Marine) — Policy of—Construction—Perils of the Sea—Cargo damaged by Leak caused by Rotten Condition of the Hulk.*

Where opium stored on a wooden hulk moored in a river was damaged by water percolating through a leak caused by the rotten condition of the hulk unknown to the plaintiffs:—

Held, that the damage was not caused by the perils of the sea within the meaning of a time policy of insurance against marine risks.

The Xantho (1887) 12 App. Cas. 509, followed. E. D. Sassoon & Co. *v.* Western Assurance Company - - - - - **P. C. 561**

—— **HONG KONG.**
See No. 23, above.

26. —— **NATAL**—*Natal Municipal Corporations Act*, 1872, *s.* 77—*Contract for Lease—Authority of the Governor—Plea that Contract had been rescinded—Reclamation Works on the Leased Lands—Acquiescence.*

To a suit for rent in respect of lands in Durban contracted to be leased in 1902 to the appellants by the respondent corporation the former pleaded (1.) that the contract was ultra vires of the corporation, by reason that the lease tendered had been granted without the consent of the Governor of the Colony; (2.) that the respondents had broken the contract and so dealt with the leased lands as to terminate the lease and their rights thereunder:—

Held, that under s. 77 of Natal Law 19 of 1872 (Municipal Corporations Act) the Governor's consent was necessary and on the evidence had been validly given.

Reclamation works upon the land leased, conducted for years by the Government under Act 36 of 1904 in agreement with the corporation for the public good and benefit to the knowledge of the appellants, without objection made,

PRIVY COUNCIL APPEALS—*continued.*
do not entitle them to rescind their contract. SOUTH AFRICAN BREWERIES, LIMITED *v.* DURBAN CORPORATION - - - - **P. C. 412**

27. —— **NEW SOUTH WALES**—*Contract—Construction—Sale of Cargoes c.i.f.—Cost of Stevedoring to be paid by Purchaser—Shipowners' Contribution.*

Where the consignees of two cargoes of coal sold them to the Government on c.i.f. terms, the latter guaranteeing their discharge, "cost of stevedoring to be paid by the Government," and it appeared that the consignees had previously to the knowledge of the purchasers agreed with the shipowners to effect the discharge, "steamer paying 1*s.* per ton towards cost of same" :—

Held, that the finding of the Courts below that the purchasers' contract had been fulfilled by payment of the said cost less the stipulated contribution by the shipowners would not be disturbed. WHITE *v.* WILLIAMS - **P. C. 814**

28. —— *Land and Income Tax Assessment Act*, 1895, *s.* 27, *sub-ss. I. and VI.—Land and Income Tax Assessment Act*, 1904, *s.* 3, *sub-s.* 2—*Construction.*

Sect. 27 of the New South Wales Land and Income Tax Assessment Act of 1895 provided by sub-s. 1 that the amount of taxable income for the year preceding the year of assessment should be taken as the basis of calculating the income tax payable, and by sub-s. 6 that in all other cases, i.e., not specified in preceding subsections, the taxable amount shall be the total amount of income from all sources less authorized deductions. Sect. 3, sub-s. 2, of an amending Act of 1904 re-enacted the above sub-s. 1 expressly "subject to the provisions of section 27" :—

Held, that sub-s. 6 applied to the respondent's case, whose income derived from the use of land was first assessable in 1907 and must be assessed as derived in that year. The other sub-sections mentioned above apply only where the taxpayer has been in actual receipt of taxable income in the year preceding the year of assessment and not otherwise. COMMISSIONERS OF TAXATION OF NEW SOUTH WALES *v.* ADAMS - **P. C. 384**

29. —— **NEW ZEALAND**—*Damages, Action for—Negligent Driving of a Motor Car—Retention of Control by the Owner.*

Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not of itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving. SAMSON *v.* AITCHISON **P. C. 844**

30. —— **NEWFOUNDLAND** — *Telegraph Cables—Newfoundland Act*, 1905 (5 *Edw.* 7, *c.* 7) —*Taxation of Telegraph Cables landed in the Colony—Construction—Company not carrying on Business in or from the Colony.*

Newfoundland Act 5 Edw. 7, c. 7, imposes taxation on every telegraph company carrying on telegraph business in or from the Colony in respect of every telegraph cable (not exceeding five) landed thereon or established therein :—

Held, that the appellant company, which by contract with the Government in 1905 (confirmed by 6 Edw. 7, c. 10) was prohibited from competing with the Government or transmitting or receiving business from or to the Colony without its permission, and which never attempted to trangress the restriction, was not liable to taxation under the said Act in respect of its cables landed on the Colony. COMMERCIAL CABLE COMPANY *v.* ATTORNEY-GENERAL OF NEWFOUNDLAND - - - - - **P. C. 820**

31. —— *Telegraph—Construction of Contract—Restricted Use by Defendants of Plaintiffs' Special Wire over their Railway—Defendants Trustees of Profits from unauthorized User of Special Wire — Account — Limitation — Newfoundland Trustee Act*, 1898.

The appellants were in possession of their railway under a lease which was subject to a subsisting contract with the respondents under which they were entitled to use a special wire erected and maintained by the respondents in and about their railway as defined in the contract, but were bound "not to pass or transmit any commercial messages over the said special wire except for the benefit and account of" the respondents. They nevertheless used it for all the purposes of their business, including certain new and extended lines of railway and their shipping business, and other commercial undertakings :—

Held, that in regard to the unauthorized user of the special wire the appellants were accountable as trustees for the profits so made to the respondents, and that having regard to the Newfoundland Trustee Act, 1898, their plea of limitation must be overruled.

Burdick v. *Garrick* (1870) L. R. 5 Ch. 233, approved. REID-NEWFOUNDLAND COMPANY *v.* ANGLO-AMERICAN TELEGRAPH COMPANY, LIMITED - - - - - - - **P. C. 555**

—— **SHANGHAI.**
See Nos. 24, 25, above.

32. —— **SIERRA LEONE** — *Practice—Removal of a Barrister's Name from the Court Rolls rescinded—Irregularities without Evidence of Fraud.*

By three orders of the Supreme Court of Sierra Leone the appellant was fined for contempt of Court and forgery and his name was removed from the roll of barristers and solicitors of the said Court :—

Held, that these orders must be reversed and the fines returned. Procurement of a warrant and arrest from a criminal Court, unless tainted by fraud, is not a contempt of the civil Court which had previously refused to grant it. Nor is the substitution in subpœnas without intent to defraud of names of witnesses whose evidence is bona fide required for names of those who are discovered to know nothing of the case sufficient to establish the offence of forgery. IN THE MATTER OF TAYLOR - - - **P. C. 347**

PRIVY COUNCIL APPEALS—*continued.*

33. —— **STRAITS SETTLEMENTS (SETTLEMENT OF PENANG)**—*Oral Evidence — Weight to be given to Opinion of Trial Judge—Duty of Court of Appeal.*

Where upon an issue depending upon oral evidence there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and examined the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities.

The trial judge found that the respondent's mother was the adopted and not the natural daughter of the testator in the cause. The Court of Appeal rejected the whole of the appellants' evidence in support of the adoption as having been adduced on behalf of suitors who had acted dishonestly.

Their Lordships restored the finding of the trial judge. He had fully considered the appellants' conduct, but nevertheless believed the independent witnesses called by them in preference to those called by the respondent, and his finding was consistent with the probabilities of the case. KHOO SIT HOH *v.* LIM THEAN TONG - - - - - **P. C. 323**

PROHIBITION—Repulsion from Holy Communion—Lawful cause—Marriage with deceased wife's sister - - **533**
See ECCLESIASTICAL LAW.

PUBLIC HEALTH—Stream—Pollution—Injunction—Court of Appeal—Jurisdiction—Discharge of injunction on subsequent facts—Reference to expert—Procedure
See STREAM. **788**

QUEBEC—Laws of.
See PRIVY COUNCIL APPEALS. 18, 19.

RAILWAY—*Minerals—"Freestone"—Relevancy—Railways Clauses Consolidation (Scotland) Act,* 1845 (8 *&* 9 *Vict. c.* 33), *ss.* 70, 71.

Whether a particular substance is or is not a "mineral" within the meaning and for the purpose of ss. 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, is a question of fact to be determined by the evidence; and an averment that certain freestone rock underneath land acquired by a railway company did not form the substratum of the soil, but on the contrary was a substance of exceptional character and recognized in the mining and commercial world and by all railway companies and by all proprietors in or through whose lands railway companies had occasion to construct lines and relative works to be a mineral within the meaning of the Act, is sufficient to warrant the allowance of a proof.

So *held*, reversing the decision of the Second Division of the Court of Session, 1911 S. C. 552. SYMINGTON *v.* CALEDONIAN RAILWAY COMPANY - - - - - - **H. L. (Sc.) 87**

—— Canada—Jurisdiction of Board of Railway Commissioners - - - - **333**
See PRIVY COUNCIL APPEALS. 6.

RAILWAY—*continued.*

—— "Obstruction"—Road belonging to railway company subject to public right—"Road forming part of any railway"
See SCOTTISH LAW. 2. **520**

—— Power of Board of Railway Commissioners—Condition as to compensation ultra vires—Law of Canada - - - **224**
See PRIVY COUNCIL APPEALS. 7.

RECEIVER — Company — Debenture - holders' action—Receiver and manager—Powers—Ship—Bill of lading - - **254**
See COMPANY.

REDEMPTION—Mortgage.
See under MORTGAGE.

RELIGION — Charitable bequest — Religious purposes - - - - - **407**
See PRIVY COUNCIL APPEALS. 1.

REPAIRS — Covenant, Repairing — Breach — Waste — Relief against forfeiture — Terms of relief—Conversion of chapel into theatre - - - - - **623**
See LANDLORD AND TENANT.

RES JUDICATA—Criminal conversation—Laws of Hong Kong - - - - **400**
See PRIVY COUNCIL APPEALS. 23.

RESTRAINT OF TRADE.
See under TRADE.

REVENUE—*Income Tax—Fire Insurance Company—Profits or Gains—Premium Receipts—Deductions for Unexpired Risks.*

There is no rule of law that in assessing a fire insurance company to income tax the total premium receipts for the year, after deducting the losses and disbursements for the same period, are to be taken as the profits of the company, without making any allowance for unexpired risks on policies outstanding at the end of the year; but where it becomes necessary to have recourse to some form of estimate, that method will be adopted which approximates most nearly to the truth.

Where, therefore, it was proved, on an appeal by a fire insurance company against an assessment, that it was the practice of the company, in making up its annual accounts for the purpose of ascertaining the profits for distribution amongst its shareholders, to carry forward to the succeeding year a certain percentage of its premium receipts as an allowance to meet unexpired risks on outstanding policies, and that this percentage was a fair and reasonable allowance for that purpose, and the figures, on the triennial average prescribed by the Income Tax Acts, shewed a large increase in the amount of such allowance for the year of assessment:—

Held, that in the circumstances it was competent to the company to make an allowance in respect of unexpired risks, and that the increase in the allowance formed no part of the profits or gains of the year.

General Accident, Fire and Life Assurance Corporation v. *McGowan* [1908] A. C. 207, explained and distinguished. SUN INSURANCE OFFICE *v.* CLARK - - - **H. L. (E.) 443**

REVENUE—*continued.*

2. —— *Income Tax—Profits of Trade—Interest payable on Loans—Deductions—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D., First Case, rr.* 3, 4.

The respondent company carried on an investment business and had under its memorandum of association power to borrow and raise money by way of loan, discount, cash, credit, overdraft, &c., and further to grant security for any sums of money so borrowed. In the course of its business the company purchased in New York bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the respondents' available cash, and certain of the securities which were lying in New York they pledged to their bankers in New York, in consideration of which the bankers allowed the respondents' banking account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the respondents bought and sold securities, and they were charged periodic interest at current rates from day to day. In 1906 they opened a loan account, in addition to the overdraft, with their bankers, on which the bankers granted a loan not exceeding $200,000 for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated and the balance transferred to current account. The bank collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the respondents. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month the interest was debited to the overdraft on the current account. The respondents in stating their profits for assessment for income tax deducted the amount of interest paid to the bankers, but this deduction was disallowed by the Commissioners on the ground that the interest in question was interest on capital employed in the business of the company and therefore could not properly be deducted from the profits of the business:—

Held (affirming the decision of the First Division of the Court of Session, 1910 S. C. 966), that the Commissioners were wrong in their decision, for the money borrowed by the respondents could not be treated as "capital" within the meaning of the Income Tax Acts; and the interest paid for the use of the money was an outgoing by means of which the respondents procured the use of the thing by which they made a profit and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which were earned by them.

Anglo-Continental Guano Works v. *Bell* (1894) 3 Tax Cases, 239, distinguished. FARMER *v.* SCOTTISH NORTH AMERICAN TRUST, LIMITED **H. L. (Sc.) 118**

—— New South Wales Land and Income Tax Assessment Acts - - - **384**
See PRIVY COUNCIL APPEALS. 28.

REVENUE—*continued.*

—— Succession duty—New Brunswick Succession Duty Act, 1896, s. 1 (5.)—Construction - - - - - - **212**
See PRIVY COUNCIL APPEALS. 13.

REVIEW—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

RULES OF THE SUPREME COURT:—

—— **Order XXXI.**, **rr. 12, 19**A—(*Discovery*) **709**
See DISCOVERY.

—— **Order XXXVI.**, **rr. 49, 55**C—(*Trial*) - **788**
See STREAM.

—— **Order LVIII.**, **rr. 1, 4**—(*Appeals to the Court of Appeal*) - - - - - **788**
See STREAM

SALE OF GOODS—*C. i. f. Contract—Terms Net Cash—Payment against Shipping Documents—Delivery—Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 28.

A contract for the sale of hops to be shipped from the Pacific Coast to this country provided that the buyer should pay for the hops at the rate of ninety shillings sterling per 112 lbs. "c.i.f. to London, Liverpool or Hull. Terms net cash." The contract contained no terms expressly providing for payment against shipping documents:—

Held, that the seller was entitled to payment upon his shipping the goods and tendering to the buyer the bill of lading and insurance policy.

Decision of the Court of Appeal [1911] 1 K. B. 934, reversed. E. CLEMENS HORST COMPANY *v.* BIDDELL BROTHERS - - **H. L. (E.) 18**

—— Goods not according to contract—Measure of damages—Arbitration - - **673**
See DAMAGES.

SALFORD CORPORATION ACT, 1899 - **465**
See TRAMWAY.

SALMON FISHING.
See under FISHERIES.

SCOTTISH LAW—*Dignity—Heritable Office—Fees of Honour—Prescription—Act and Treaty of Union, Rev. Stat.* 1706 (6 *Anne, c.* 11).

By the Treaty of Union between England and Scotland it was provided, article 20, "That all heritable offices . . . . be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this treaty":—

Held, reversing the decision of the Second Division of the Court of Session, 1910 S. C. 1037, that this treaty did not enlarge the rights of the holders of the heritable office of Usher of the White Rod in Scotland so as to entitle them to claim fees of honour from all recipients of honours whose titles were titles of the United Kingdom of Great Britain and Ireland; and that the holders of the said heritable office were only entitled to fees from a Scotchman who received an honour or from an Englishman when he was the recipient of a purely Scottish honour. LORD ADVOCATE *v.* WALKER TRUSTEES **H. L. (Sc.) 95**

SCOTTISH LAW—*continued.*

2. —— *Street—Private Street—"Obstruction"—Road belonging to Railway Company subject to Public Right—"Road forming part of any railway"—Local Government—Burgh Police (Scotland) Act*, 1892 (55 *&* 56 *Vict. c.* 55), *s.* 4, *sub-s.* 31—*Burgh Police (Scotland) Act*, 1903 (3 *Edw.* 7, *c.* 33), *s.* 104, *sub-s.* 2 (*d*).

By the Burgh Police (Scotland) Act, 1892, s. 4, sub-s. 31, "'Street' shall include any road, highway, ... thoroughfare, and public passage or other place within the burgh used either by carts or foot passengers, and not being or forming part of any harbour, railway, or canal station . . . ." By the Burgh Police (Scotland) Act, 1903, which refers to the Burgh Police Act of 1892 as the "principal Act," s. 103, sub-s. 6, "'Private street' shall, in the principal Act and in this Act, mean any street other than a public street." By s. 104, sub-s. 2 (*d*), " . . . . Where any private street or part of such street has not . . . . been sufficiently levelled, paved . . . . and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof . . . . to be freed from obstructions and to be properly levelled, paved . . . ."

In an action by the appellants, a railway company, against the respondents for a declaration that a strip of ground acquired by the company was not subject to any of the provisions of the Burgh Police (Scotland) Acts, 1892 to 1903, it appeared that the ground formed half of a road or street and had been purchased in 1889 by the company for "extraordinary purposes" under s. 38 of the Railways Clauses Consolidation (Scotland) Act, 1845. The company made no use of the ground until 1908, and it was never metalled or made up as a road, but it was admitted that it had been used by the public as a right of way for all purposes since the year 1841. In 1908 the company laid down a double line of rails on the ground which were an obstruction to the public right of way:—

Held, affirming the decision of the First Division of the Court of Session (1911 S. C. 298), that in the circumstances the road could not be taken to be "part of a railway" within the meaning of s. 4 of the Act of 1892, but must be regarded as a "private street," and the rails were liable to be removed as "obstructions" within the meaning of s. 104 of the Act of 1903. GLASGOW AND SOUTH WESTERN RAILWAY COMPANY *v.* PROVOST, &C., OF THE BURGH OF AYR - - - - - **H. L. (Sc.) 520**

3. —— *Succession—Testament—Construction—Provision to Widow of "liferent use and enjoyment" of House—Liferent or Occupancy—Incidence of Rates and Burdens.*

A testator directed his trustees to give to his widow "the liferent use and enjoyment" of his dwelling-house:—

Held, that the right of the widow was a right of liferent, and that she was liable for the proprietor's rates and burdens.

Cathcart's Trustees v. *Allardyce* (1889) 2 F. 326, overruled.

Interlocutor of the Second Division of the Court of Session in Scotland, 1911 S. C. 321, reversed. MACKENZIE *v.* JOHNSTONE **H. L. (Sc.) 743**

—— Railway—Minerals—"Freestone"—Relevancy - - - - - **87**
See RAILWAY.

—— Revenue—Income tax—Profits of trade—Interest payable on loans—Deductions **118**
See REVENUE. 2.

—— Shipping—Transit partly by land and partly by sea—Duty of shipowner to notify inland carrier of damage to goods **130**
See SHIPPING. 2.

—— Workmen's compensation—Competency—Claim by father of deceased employee against son's employers—Sheriff Courts (Scotland) Act, 1907 - - - **105**
See EMPLOYER AND WORKMAN. 4.

—— Workmen's compensation — Negligence — Management of coal mine - - **149**
See EMPLOYER AND WORKMAN. 10.

—— Workmen's compensation—Workman requiring presence of his own medical attendant at examination - - **74**
See EMPLOYER AND WORKMAN. 3.

SEAMAN.
See under SHIPPING.

SEIGNIORY—Title to a seigniory—Claim of appellants to a trust in their favour—Appeal from Canada - - - **872**
See PRIVY COUNCIL APPEALS. 19.

SERVANT—Master and.
See MASTER AND SERVANT.

SETTING ASIDE — Arbitration — Appeal — Jurisdiction—Consultative opinion of High Court on special case—Award incorporating opinion—Error on face of award - - - - - - - **673**
See DAMAGES.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SHANGHAI—China—Laws of.
See PRIVY COUNCIL APPEALS. 24, 25.

SHERIFF COURTS (SCOTLAND) ACT, 1907 105
See EMPLOYER AND WORKMAN. 4.

SHIPPING — *Bill of Lading — Incorporation of Conditions of Charter Party—Arbitration Clause.*

A bill of lading provided that the goods shipped thereunder should be delivered to the shipper or to his assigns, "he or they paying freight for the said goods, with other conditions as per charter party," and in the margin was written, in ink, "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter party, including

SHIPPING—*continued.*

negligence clause." The charter party provided that "Any dispute or claim arising out of any of the conditions of this charter shall be adjusted at port where it occurs, and same shall be settled by arbitration":—

Held, that the arbitration clause was not incorporated in the bill of lading.

Hamilton & Co. v. *Mackie & Sons* (1889) 5 Times L. R. 677, followed.

Decision of the Court of Appeal [1911] P. 54, affirmed.

THOMAS & CO., LIMITED *v.* PORTSEA STEAMSHIP COMPANY, LIMITED - **H. L. (E.) 1**

2. —— *Bill of Lading—Through Bill of Lading—Transit partly by Land and partly by Sea—Duty of Shipowner to notify Inland Carrier of Damage to Goods.*

In an action for damage to flour carried in the defenders' steamship from New York to Glasgow, it appeared that the flour was despatched under a through bill of lading from Minneapolis to Glasgow via New York, signed by an agent "on behalf of carriers severally and not jointly," and stating that the goods had been received at Minneapolis "in apparent good order except as noted." This bill of lading was subject to conditions dealing with the service up to the port of New York, which provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route nor after the property was ready for delivery to the next carrier or to consignee, and also that claims for loss or damage must be made to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof no carrier should be liable thereunder, and provided that the contract was executed and accomplished and all liability thereunder terminated on the delivery of the property to the steamer, her master, agents, or servants. Another part of the bill of lading dealing with the service after delivery at New York and until delivery at Glasgow provided that the steamer should not be liable for inland damage and should "only be responsible for such part of the goods as had been actually delivered to her at the port" of New York, and should not be liable for any loss or damage that might have occurred before such delivery, and also that the shipment until delivery at Glasgow should be subject to the American statute called the Harter Act. The receipts signed by the defenders' agent and given to the inland carriers stated that 110 bags of flour were damaged by "caking." The flour was contained in over 41,000 bags. The flour after its arrival at Glasgow was found to be damaged by "caking" to the extent of 4132 bags:—

Held, reversing the decision of the Second Division of the Court of Session, 1911 S. C. 791, that the defenders were bound by the statement contained in the bill of lading that the goods were received by them in "apparent good order and condition" save as noted, i.e., save as to 110 bags, and were therefore subject to the onus of proving that the damage, except so far as they had notified the inland carrier, was in fact done before they had possession of the flour; that this onus had not been discharged; and that the defenders were liable. CRAWFORD & LAW *v.* ALLAN LINE STEAMSHIP COMPANY **H. L. (Sc.) 130**

3. —— *Charterparty—Time Charter—Construction—Payment of Hire—Exemption Clause—Strike.*

By a time charterparty a steamship was let at a monthly hire for a certain period to be employed in such lawful trades as the charterers should direct within certain geographical limits, and the charterparty contained an exemption clause, which provided that "the owners and charterers shall be mutually absolved from liability in carrying out this contract in so far as they may be hindered or prevented" by (among other things) strikes. During the currency of the charter the charterers ordered the ship to a port where, to their knowledge, a strike of colliers was in operation, for the purpose of loading a cargo of coal. On the arrival of the ship, she was prevented by the strike from loading for several weeks. A dispute arose between the owners and the charterers as to whether under the charterparty the hire was payable during this period:—

Held, (1.) upon the construction of the exemption clause (Lord Shaw of Dunfermline dissenting), that the words "carrying out this contract" meant merely performing the obligations imposed upon the respective parties by the contract and did not include exercising the rights bestowed upon them by the contract; (2.) that upon any construction of the clause the charterers were not prevented by the strike from carrying out the contract, inasmuch as they could have withdrawn the ship from the strike area; consequently that the hire was payable.

Decision of the Court of Appeal affirmed. BROWN *v.* TURNER, BRIGHTMAN & CO. **H. L. (E.) 12**

4. ——*Collision—Launch—Negligence.*

The defendants, being about to launch a steamship which they had built in their shipbuilding yard on the Mersey, arranged with the owners of a buoy which was thought to be in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. The plaintiffs' ketch, which was sailing up the river on the flood tide on the morning of the intended launch, finding the wind falling light, let go her starboard anchor and drifted up the river dragging her anchor, which fouled the mooring chains. The master being unable to free the anchor, the defendants sent messages to him warning him that his ketch was in a dangerous position and advising him to slip his anchor and clear away, but the master refused to slip unless the defendants would make themselves answerable for the anchor. The defendants, deeming it dangerous to life and property to postpone the launch and believing the risk of a collision with the ketch to be slight, launched the steamship and a collision occurred. In an action of damage by collision brought by the owners of the ketch:—

SHIPPING—*continued.*

Held, that the ketch acted unreasonably in refusing to slip her anchor and was alone to blame, inasmuch as the defendants, in the dilemma in which they were placed by the action of the ketch, rightly chose the lesser of two risks.

Decision of the Court of Appeal [1911] P. 261, affirmed. Owners of Ketch "Francis" *v.* Owners of Steamship "Highland Loch." The "Highland Loch" - **H. L. (E.) 312**

5. —— *Collision—Negligence of both Ships—Negligence contributing to Accident—Sudden Emergency.*

In an action of damage by collision brought by the Admiralty and the officers and crew of a torpedo boat destroyer (suing for their lost effects) against the owners of a merchant steamship, who counterclaimed against the officers of the destroyer, the President held that those in charge of the merchant ship were negligent in getting the ship into a wrong position with reference to a flotilla of warships, of which the destroyer formed part, and in wrongly porting her helm; that the commander of the destroyer was negligent in giving contradictory orders consequent on the porting of the helm by the merchant ship; and that the collision could have been avoided by the exercise of ordinary care and skill on the part of the destroyer. He therefore held that the destroyer was alone to blame. The Court of Appeal, reversing the President on a finding of fact, found that the merchant ship, when porting her helm, omitted to sound the appropriate signal required by art. 28 of the Regulations for Preventing Collisions at Sea, and held there was statutory blame on the part of the merchant ship within s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, and consequently that both vessels were to blame:—

Held, on the facts found by the President, that the negligence of the merchant ship mainly contributed to the collision, and that both vessels were in fact at fault.

Decision of the Court of Appeal [1911] P. 128, affirmed on different grounds. "Hero" (Owners of S.S.) *v.* Commissioners for Executing the Office of Lord High Admiral of the United Kingdom - **H. L. (E.) 300**

6. —— *Collision — Pilotage — Moving on Stationary Vessels — Compulsory Pilot—Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 633.

Interlocutor of the First Division of the Court of Session, 1911 S. C. 836, affirmed on the facts. Alexander Stephen & Sons, Limited *v.* Allan Line Steamship Company, Limited **H. L. (Sc.) 532**

7. —— *Collision — Tug and Tow — Tow in Collision with third Vessel — Tug and third Vessel both to blame—Non-liability of Tow—Admiralty Rule as to Division of Loss—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

There is no principle of admiralty law which

SHIPPING—*continued.*

precludes an innocent ship damaged by collision through the fault of two other ships from recovering the whole damage from either of the delinquent ships.

The "Milan" (1861) Lush. 388, discussed.

In cases of collision the question of the identity of a tow with its tug is a question of fact, and where a collision occurs through the faulty navigation of a tug, and the tow is, as regards navigation, completely under the control of the tug and does not stand to the latter in the relation of master and servant, the tow is to be regarded as an innocent ship in no sense identified with the delinquent tug.

Therefore, where a dumb barge in tow of a tug, which had the sole control and management of the navigation, was damaged by collision with a third vessel owing to the faulty navigation of the tug and the third vessel, and the owners of the tow brought an action in rem against the owners of the third vessel only:—

Held, that the defendants were liable for the whole damage.

Decision of the Court of Appeal [1912] P. 21, affirmed. Owners of S.S. "Devonshire" *v.* Owners of Barge "Leslie" **H. L. (E.) 634**

8. —— *Contract of Affreightment — Dead Freight—Lien — Unseaworthiness — Deviation—Port of Refuge—Necessity caused by Unseaworthiness.*

A contract of affreightment is not put an end to either by a breach of the warranty of seaworthiness or by a deviation which is in fact necessary for the safety of the ship and crew but the necessity for which is caused by unseaworthiness.

The "Europa" [1908] P. 84, followed and approved.

Strang, Steel & Co. v. *Scott & Co.* (1889) 14 App. Cas. 601, explained and distinguished.

McLean v. *Fleming* (1871) L. R. 2 H. L. Sc. 128, establishes that dead freight includes unliquidated damages for the failure to load a full cargo.

The charterers of a ship having failed to load a full cargo as required by the charterparty, the master, to minimize the loss, procured a cargo from other sources and overloaded the deck to such an extent as to render the ship unseaworthy. In consequence of her unseaworthiness the ship was obliged to deviate from her course in order to put into a port of refuge for repairs, and, after repairing, she completed the voyage in safety. The shipowner was entitled under the charterparty, the conditions of which were incorporated in the bills of lading, to a lien on the cargo for dead freight:—

Held, that he was not debarred from asserting the lien against the cargo owners.

Decision of the Court of Appeal [1911] 1 K. B. 625, reversed. J. & E. Kish *v.* Charles Taylor, Sons & Co. - - - **H. L. (E.) 604**

—— Bill of lading—Ship—Lien—Shipment by receiver - - - - - **254**
See Company.

SHIPPING—*continued.*

—— Contract—Construction—Sale of cargoes c.i.f.—Cost of stevedoring to be paid by purchaser — Shipowners' contribution *See* PRIVY COUNCIL APPEALS. 27. **814**

—— Sale of goods—C.i.f. contract—Terms net cash—Payment against shipping documents—Delivery - - - - **18**
See SALE OF GOODS.

—— Workmen's compensation—Seaman on duty on watch—Unexplained disappearance **238**
See EMPLOYER AND WORKMAN. 9.

SIERRA LEONE—Laws of - - - **347**
See PRIVY COUNCIL APPEALS. 32.

STATUTES :—

I. IMPERIAL STATUTES.

1547.

1 Edw. 6, c. 1, s. 8 - - - - - **533**
See ECCLESIASTICAL LAW.

1677.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* - **39**
See FRAUDS, STATUTE OF.

1706.

6 Anne, c. 11 (Act and Treaty of Union, Rev. Stat., 1706 (6 Anne, c. 11)) - **95**
See SCOTTISH LAW. 1.

1745

19 Geo. 2, c. 13 (Ir.), s. 1 - - - **276**
See CONFLICT OF LAWS.

1842.

5 & 6 Vict. c. 35, s. 100, Sched. D., First Case, rr. 3, 4—*Income Tax* - - **118**
See REVENUE. 2.

1845.

8 & 9 Vict. c. 33, ss. 70, 71—*Railways Clauses Consolidation* (*Scotland*) - **87**
See RAILWAY.

1846.

9 & 10 Vict. c. 66, s. 3—*Poor Removal* - **475**
See POOR LAW.

1848.

11 & 12 Vict. c. 111, s. 1—*Poor Removal* **475**
See POOR LAW.

1850.

13 & 14 Vict. c. 88, s. 1—*Fisheries* (*Ireland*)
See FISHERIES. **287**

1863.

26 & 27 Vict. c. 114, s. 4—*Fisheries* (*Ireland*)
See FISHERIES. **287**

1870.

33 & 34 Vict. c. 78, ss. 19, 34, 35—*Tramways*
See TRAMWAY. **465**

STATUTES—*continued.*

1871.

34 & 35 Vict. c. 31, ss. 3, 4—*Trade Union* - **421**
See TRADE UNION.

1873.

36 & 37 Vict. c. 66, s. 25, sub-s. 9—*Judicature*
See SHIPPING. 7. **634**

1875.

38 & 39 Vict. c. 55, s. 17—*Public Health* **788**
See STREAM.

1876.

39 & 40 Vict. c. 61, ss. 34, 35—*Divided Parishes and Poor Law Amendment* - - **475**
See POOR LAW.

1881.

44 & 45 Vict. c. 41, s. 14, sub-ss. 1, 2, 3—*Conveyancing* - - - - **623**
See LANDLORD AND TENANT.

1887.

50 & 51 Vict. c. 58, s. 16; s. 49, r. 30—*Coal Mines Regulation* - - - **693**
See MASTER AND SERVANT.

—— —— s. 49; General Rules 4 (1.), 7; Special Rule 37 - - - - **149**
See EMPLOYER AND WORKMAN. 10.

1889.

52 & 53 Vict. c. 49, ss. 5, 20—*Arbitration* **666**
See ARBITRATION.

—— —— ss. 13, 15, 17 - - - - **788**
See STREAM.

1892.

55 & 56 Vict. c. 55, s. 4, sub-s. 31 — *Burgh Police* (*Scotland*) - - - - **520**
See SCOTTISH LAW. 2.

1893.

56 & 57 Vict. c. 39, s. 25, sub-s. 1—*Industrial and Provident Societies* - - **483**
See INDUSTRIAL AND PROVIDENT SOCIETY.

56 & 57 Vict. c. 71, s. 28—*Sale of Goods* - **18**
See SALE OF GOODS.

1894.

57 & 58 Vict. c. 60, s. 633—*Merchant Shipping* - - - - - - **532**
See SHIPPING. 6.

1897.

60 & 61 Vict. c. 37—*Workmen's Compensation*
See PRIVY COUNCIL APPEALS. 9. **590**

1898.

61 & 62 Vict. c. 36, s. 4—*Criminal Evidence*
See CRIMINAL LAW. **305**

1899.

62 & 63 Vict. c. ccxliv., ss. 3, 4, 28—*Salford Corporation* - - - - - **465**
See TRAMWAY.

STATUTES—*continued.*

1901.

1 Edw. 7, c. cxxii., ss. 3, 24—*Eccles Corporation* - - - - - - - 465
See TRAMWAY.

1903.

3 Edw. 7, c. 33, s. 104, sub-s. 2 (*d*)—*Burgh Police (Scotland)* - - - - - 520
See SCOTTISH LAW. 2.

3 Edw. 7, c. 37, s. 24, sub-s. 13—*Irish Land*
See PRACTICE. 281

1906.

6 Edw. 7, c. 58, s. 1, sub-s. 1—*Workmen's Compensation* - - - 35, 44, 238
See EMPLOYER AND WORKMAN. 1, 5, 9.

—— —— s. 1, sub-s. 1; Sched. I., pars. 1 (*b*), 3 496, 513
See EMPLOYER AND WORKMAN. 2, 7.

—— —— s. 1, sub-s. 1; pars. 1 (*b*), 16 - 319
See EMPLOYER AND WORKMAN. 8.

—— —— ss. 13, 14 - - - - - 105
See EMPLOYER AND WORKMAN. 4.

—— —— Sched. I., cl. 4 - - - - 74
See EMPLOYER AND WORKMAN. 3.

—— —— Sched. I., par. 16 - - - 242
See EMPLOYER AND WORKMAN. 6.

1907.

7 Edw. 7, c. 47, s. 1—*Deceased Wife's Sister's Marriage* - - - - - - 533
See ECCLESIASTICAL LAW.

7 Edw. 7, c. 51, s. 30—*Sheriff Courts (Scotland)* - - - - - - 105
See EMPLOYER AND WORKMAN. 4.

7 Edw. 7, c. clxxi., ss. 8, 9, 16, 20, 25—*Metropolitan Water Board (Charges)* - 24
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II. COLONIAL STATUTES.

Canada, Statutes of:

Canadian Act, 1840 (3 & 4 Vict. c. 30) - 872
See PRIVY COUNCIL APPEALS. 19.

British North America Act, 1867 - - 571
See PRIVY COUNCIL APPEALS. 5.

—— —— ss. 91, 92 - - - - - 880
See PRIVY COUNCIL APPEALS. 4.

Dominion Lands Act (R. S. C., 1886, c. 54) 827
See PRIVY COUNCIL APPEALS. 8.

Railway Act of 1888, s. 90 - - - - 834
See PRIVY COUNCIL APPEALS. 15.

North-West Irrigation Act, 1898 - - 827
See PRIVY COUNCIL APPEALS. 8.

Dominion Statute, 1900, 63 & 64 Vict. c. 98, s. 1 (*a*) - - - - - - 546
See PRIVY COUNCIL APPEALS. 18.

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British Columbia Workmen's Compensation Act, 1902 - - - - - - 590
See PRIVY COUNCIL APPEALS. 9.

Canadian Act, 1902 (2 Edw. 7, c. 107), ss. 12, 13, 21 - - - - - - - 834
See PRIVY COUNCIL APPEALS. 15.

Dominion Act, 1903 (3 Edw. 7, c. 71) - 204
See PRIVY COUNCIL APPEALS. 3.

Dominion Act, 1904 (4 Edw. 7, c. 24) - 204
See PRIVY COUNCIL APPEALS. 3.

Dominion Railway Act, 1906, ss. 47, 159, 237 (3.) - - - - - - 224
See PRIVY COUNCIL APPEALS. 7.

Railway Act of Canada (1906, R. S. C., c. 37), s. 8, sub-s. (*b*) - - - - - 333
See PRIVY COUNCIL APPEALS. 6.

Railway Act of 1906, s. 247 - - - - 834
See PRIVY COUNCIL APPEALS. 15.

New Brunswick Succession Duty Act, 1896 s. 1 (5.) - - - - - - 212
See PRIVY COUNCIL APPEALS. 13.

Newfoundland, Statutes of:

Newfoundland Trustee Act, 1898 - - 555
See PRIVY COUNCIL APPEALS. 31.

Newfoundland Act, 1905 (5 Edw. 7, c. 7) 820
See PRIVY COUNCIL APPEALS. 30.

Ceylon, Statutes of:

C. C. P., ss. 5 and 404 - - - - - 194
See PRIVY COUNCIL APPEALS. 21.

Limitation Ordinance, 1871, s. 3. - - 230
See PRIVY COUNCIL APPEALS. 22.

Hong Kong, Statute of:

Hong Kong Ordinance No. 20 of 1908 - 400
See PRIVY COUNCIL APPEALS. 23.

Natal, Statute of:

Natal Municipal Corporations Act, 1872, s. 77 412
See PRIVY COUNCIL APPEALS. 26.

New South Wales, Statutes of:

New South Wales Land and Income Tax Assessment Act, 1895, s. 27, sub-s. I. and VI. - - - - - - - 384
See PRIVY COUNCIL APPEALS. 28.

New South Wales Land and Income Tax Assessment Act, 1904, s. 3, sub-s. 2 384
See PRIVY COUNCIL APPEALS. 28.

STEVEDORE—Contract—Construction—Sale of cargoes c.i.f.—Cost of stevedoring to be paid by purchaser—Shipowners' contribution - - - - - - 814
See PRIVY COUNCIL APPEALS. 27.

STRAITS SETTLEMENTS — Settlement of Penang—Laws of - - - - 323
See PRIVY COUNCIL APPEALS. 33.

STREAM — *Pollution — Injunction — Court of Appeal—Jurisdiction—Discharge of Injunction on Subsequent Facts—Reference to Expert—Procedure—Breach of Statutory Duty by Public Body—Remedy—Right of Attorney-General to Injunction—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 17—*Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 13, 15, 17—*Rules of the Supreme Court, Order* XXXVI., *rr.* 49, 55C; *Order* LVIII., *rr.* 1, 4.

An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard.

The Court of Appeal may, without the consent of the parties, refer any question arising on the appeal to an expert to inquire and report; and although the prescribed mode of conducting such inquiry is by taking evidence, the parties may waive that procedure and may consent to the inquiry being conducted by means of experiments.

Per Lord Robson: In an action by the Attorney-General complaining of a breach of a public statute by a public body the Court is not bound, on proof of the breach, to grant an injunction, but may allow the defendants a reasonable time within which to comply with the statute.

Kekewich J. having granted at the instance of the Attorney-General a perpetual injunction restraining a public drainage board from discharging sewage water into a river in contravention of s. 17 of the Public Health Act, 1875, the defendants appealed. Upon the appeal the defendants did not contest that the injunction was properly granted on the facts existing at the trial, but they obtained successive adjournments of the appeal to enable them to complete certain sewage works upon which they were engaged in order to comply with the section. On the completion of the works, there being a conflict of evidence as to their sufficiency, the Court referred the matter to an expert to report, and he reported that the sewage effluents from the defendants' works which entered the river after treatment by the process in use at the date of his report were at that date to such an extent freed from excrementitious and other foul or noxious matters that they did not affect or deteriorate the purity of the water in the river. The Court then, being of opinion that there was no longer any breach of the section, discharged the injunction upon the defendants undertaking to use their best endeavours to prevent any future breach; the defendants to pay the costs of the appeal:—

Held that, although the Court had jurisdiction to discharge the injunction, it ought not in the exercise of its jurisdiction to have accepted, in lieu of the injunction, an undertaking in the limited form above stated, and the House substituted for this undertaking an undertaking by the defendants that the existing results, as described in the report of the expert, should in future be maintained; the defendants to pay three fourths of the costs of the appeal to the House.

Order of the Court of Appeal [1910] 1 Ch. 48, varied. ATTORNEY-GENERAL (TAMWORTH CORPORATION AND TAMWORTH RURAL COUNCIL) *v.* BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD - - - **H. L. (E.) 788**

STREET — "Obstruction" — Private street—"Road forming part of any railway" **520**
See SCOTTISH LAW. 2.

STRIKE—Shipping—Charterparty—Exemption clause— Time charter — Payment of hire - - - - - - **12**
See SHIPPING. 3.

SUCCESSION—Testament—Construction — Provision to widow of "liferent use and enjoyment"—Liferent or occupancy—Incidence of rates and burdens - **743**
See SCOTTISH LAW. 3.

SUCCESSION DUTY—New Brunswick Succession Duty Act, 1896, s. 1 (5.)—Construction - - - - - **212**
See PRIVY COUNCIL APPEALS. 13.

TAXES—Inland Revenue.
See under REVENUE.

TELEGRAPH — Contract, Construction of — Restricted use by defendants of plaintiffs' special wire over their railway **555**
See PRIVY COUNCIL APPEALS. 31.

—— Taxation of telegraph cables landed in the Colony — Company not carrying on business in or from the Colony—Appeal from Newfoundland - - - **820**
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TENANT—Landlord and.
See LANDLORD AND TENANT.

TERMINATION—Workmen's compensation **242, 319**
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TOW—Tug and—Collision—Tow in collision with third vessel - - - - **634**
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TRADE—Income tax—Profits of trade—Interest payable on loans—Deductions - **118**
See REVENUE. 2.

—— Restraint of trade—Legality of association at common law—Legal and illegal purposes—Severability - - - **421**
See TRADE UNION.

TRADE UNION—*Restraint of Trade—Legality of Association at Common Law—Legal and Illegal Purposes—Severability—Action to enforce Payment of Benefits to Member—Jurisdiction—Trade Union Act*, 1871 (34 *&* 35 *Vict. c.* 31), *ss.* 3, 4.

The rules of a society registered under the Trade Union Acts, 1871 and 1876, combined provisions for the militant purposes of a trade union, which were admittedly in restraint of trade, with provisions for the provident purposes of a friendly society, and the subscriptions of the

TRADE UNION—*continued.*

members were applicable to all the purposes of the society. One of the rules provided for the expulsion of members for non-compliance with the decisions of the managing or branch committees directing the militant operations of the society or for violating the recognized trade rules of the district :—

Held, that an action against the society and its trustees for payment of moneys alleged to be due to a member under the rules in respect of superannuation benefit was not maintainable under the Act of 1871, and was not maintainable apart from the Act ; by Earl Loreburn L.C. and Lord Atkinson, because the society, being a voluntary association, could not have been sued in such an action in its own name ; by Lord Macnaghten, Lord Shaw of Dunfermline, Lord Mersey, and Lord Robson, because the society was an illegal association at common law, inasmuch as its main purposes were in unreasonable restraint of trade and the rules relating to those purposes were not severable from the rules relating to its provident purposes.

Decision of the Court of Appeal [1910] 1 K. B. 506, affirmed. RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS **H. L. (E.) 421**

TRAMWAY—*Statutory Powers—Ultra vires—Adjacent Districts — Working Agreement — Licence to Work—Consent of Board of Trade—Eccles Corporation Act*, 1901 (1 *Edw.* 7, *c. cxxii.*), *ss.* 3, 24—*Salford Corporation Act*, 1899 (62 *&* 63 *Vict. c. ccxliv.*), *ss.* 3, 4, 28—*Tramways Act*, 1870 (33 *&* 34 *Vict. c.* 78), *ss.* 19, 34, 35.

The Eccles Corporation were authorized by a special Act, which incorporated Parts II. and III. of the Tramways Act, 1870, to construct and maintain certain tramways in their district and to enter into agreements, subject to the approval of the Board of Trade, with the owner of any tramways in any adjacent district with respect to the construction, sale, lease, working, use and management by the contracting parties of all or any of their respective tramways. The proposed tramways were adjacent to tramways outside the Eccles district of the Salford Corporation on the east and of a tramway company on the west. Both the Salford Corporation and the tramway company had under their special Acts similar powers of entering into working agreements with the tramway owners of adjacent districts, except that the consent of the Board of Trade thereto was not required. The Eccles tramways were constructed by the Salford Corporation under the terms of an agreement entered into between the two corporations with the approval of the Board of Trade, and the Salford Corporation were entitled thereunder to a lease of these tramways for a term of years. By the special Act of the Salford Corporation, unless the subject or context otherwise required, the corporation tramways were defined as including any tramways demised to or worked by the corporation. During the currency of the agreement, the Salford Corporation, without the leave of the Eccles Corporation or of the Board of Trade, granted to the tramway company a revocable licence to run over a small portion of the Eccles tramways which adjoined the company's tramway system :—

Held, that the Eccles Corporation could not have granted the licence without the sanction of the Board of Trade, and that the Eccles tramways were not part of the Salford Corporation tramways within the definition clause of the Salford Act, so as to take them out of the operation of the Eccles Act, because the subject or context did otherwise require.

Held, therefore, that the licence was ultra vires.

Decision of the Court of Appeal [1910] 2 Ch. 263, affirmed.

SALFORD CORPORATION *v.* ECCLES CORPORATION - - - - - **H. L. (E.) 465**

TUG—Tow and—Collision—Tow in collision with third vessel - - - - - **634**
See SHIPPING. 7.

ULTRA VIRES—Tramway—Statutory powers—Adjacent districts - - - **465**
See TRAMWAY.

UMPIRE—Arbitration—Refusal of arbitrators to appoint umpire—Practice—Parties
See ARBITRATION. **666**

UNSEAWORTHINESS—Shipping.
See SHIPPING.

WASTE — Repairing covenant—Breach—Relief against forfeiture — Terms of relief—Conversion of chapel into theatre - **623**
See LANDLORD AND TENANT.

WATER—*Water Supply — London — Domestic Purposes—Trade Purposes—Building used solely for Purposes of Trade—Water supplied for Lavatories and Water Closets used by Employees —Payment on Rateable Value—Metropolitan Water Board* (*Charges*) *Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 9, 16, 20, 25.

A supply of water under the Metropolitan Water Board (Charges) Act, 1907, for water closets and baths of the dimensions stated in s. 25 is to be treated as a supply for domestic purposes within the meaning of that section.

Water supplied to a factory under this Act by the Metropolitan Water Board was used for drinking and washing purposes by the workmen employed thereat and for cleansing urinals and water closets provided for their use. No one resided on the premises :—

Held, that the Board were entitled to charge for the water so supplied as for water supplied for domestic purposes upon the rateable value of the factory, subject to the rebate allowed by the Act in the case of purely business premises.

Decision of the Court of Appeal [1911] 2 K. B. 38, affirmed. COLLEY'S PATENTS, LIMITED *v.* METROPOLITAN WATER BOARD **H. L. (E.) 24**

WILL—*Legacy—Demonstrative Legacy—Reversionary Fund—No time fixed by Will for Payment—Date from which Interest runs.*

A testator was absolutely entitled in reversion expectant on the death of his father to a

WILL—*continued.*
fund appointed to him under the will of his mother subject to the father's life interest therein. The testator, who predeceased his father, bequeathed to his sister the sum of 10,000*l.* to be paid out of the estate and effects inherited by him from his mother in terms of her last will and testament, and the residue of the aforesaid estate and effects of his said mother so to be inherited by him in terms of her aforesaid will and of all his estate and effects then in his possession and enjoyment he gave to other persons. On the death of the father the question was raised from what date the legacy of 10,000*l.* carried interest:—

Held, that the will contained no direction express or implied that payment of the legacy was to be postponed until the falling in of the reversionary fund, and, consequently, that the legacy was payable at and carried interest from the expiration of one year from the testator's death.

The rule of law laid down by Lord Cairns in *Lord* v. *Lord* (1867) L. R. 2 Ch. 782, 789, applied.

Decision of the Court of Appeal [1912] 1 Ch. 219, affirmed. WALFORD *v.* WALFORD H. L. (E.) **658**

WILL—*continued.*
—— Charitable bequest — Religious purposes - - - - - - - **407**
See PRIVY COUNCIL APPEALS. 1.

—— Succession — Testament — Construction — Provision to widow of "liferent use and enjoyment"—Liferent or occupancy —Incidence of rates and burdens . **743**
See SCOTTISH LAW. 3.

WIRE.
See TELEGRAPH.

WORDS—"Freestone" - - - - - **87**
See RAILWAY.

—— "Mineral" - - - - - - **87**
See RAILWAY.

—— "Obstruction" - - - - - - **520**
See SCOTTISH LAW. 2

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

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